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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED, PETITIONER,

vs.

JOHN M. TAYLOR AND GEORGE ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1946.

CERTIORARI GRANTED MAY 27, 1946.

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RELEVANT DOCKET ENTRIES.

Nov. 26, 1943.	Complaint filed.
Nov. 26, 1943.	Summons exit.
Nov. 26, 1943.	Plaintiff's demand for jury trial filed.
Dec. 1, 1943.	Appearance of Shields, Clark, Brown & McCown, Esqs., for Taylor & Anderson Towing and Lighterage Co., filed.
Dec. 1, 1943.	Appearance of J. F. Shrader, Esq., for B. & O. Railroad Co., filed.
Dec. 8, 1943.	Summons returned "on Nov. 29, 1943 served" and filed.
Dec. 17, 1943.	Answer of B. & O. R. R. Co. filed.
Dec. 29, 1943.	Answer of Taylor & Anderson Towing & Lighterage Co., filed.
Nov. 8, 1944.	Order to place case on the Trial List filed.
Nov. 27, 1944.	Plaintiff's interrogatories to defendants John M. Taylor, et al filed.
Nov. 27, 1944.	Plaintiff's interrogatories to defendant B. & O. Railroad Co. filed.
Dec. 21, 1944.	Answers of Baltimore & Ohio R. R. Co. to interrogatories filed.
Jan. 15, 1945.	Supplemental interrogatories propounded by plaintiff to defendants Taylor & Anderson Towing & Lighterage Co., filed.
Jan. 15, 1945.	Supplemental interrogatories propounded by plaintiff to defendant B. & O. R. R. Co., filed.
Jan. 17, 1945.	Answers of Taylor & Anderson T. & L. Co. to plaintiff's interrogatories filed.

Jan. 25, 1945. Answers of Taylor & Anderson to plaintiff's original and supplemental interrogatories filed.

Feb. 16, 1945. Further answers of Baltimore & Ohio R. R. Co. to interrogatories and answers to supplemental interrogatories filed.

Feb. 26, 1945. Order of Court dated Jan. 15, 1945, requiring defendants to answer certain interrogatories and granting leave to plaintiff to file supplemental interrogatories filed. 2/27/45 Noted.

Feb. 27, 1945. Motion by plaintiff for production of documents and Order of Court granting motion in part filed. 2/28/45 Noted and notice mailed.

Apr. 12, 1945. Hearing sur motion for production of documents.

July 30, 1945. Opinion, of the Court, by Kirkpatrick, J. requiring defendant to answer certain interrogatories and to produce documents filed.

Sept. 5, 1945. Order of Court requiring defendants and their counsel to answer certain interrogatories filed. 9/6/45 noted.

Sept. 5, 1945. Refusal of defendants and Counsel to answer certain interrogatories filed.

Sept. 5, 1945. Order of Court adjudging defendants John M. Taylor and George H. Anderson and their Counsel Samuel B. Fortenbaugh, Jr., to be in contempt of Court and committing them to prison filed. 9/6/45 Noted.

Sept 5, 1945. Notice of appeal filed. 9/5/45 Copy to A. E. Freedman.

Sept. 5, 1945. Order of Court granting supersedeas re: contempt order filed. 9/6/45 Noted.

Sept. 5, 1945. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

Sept. 19, 1945. Deposition of S. B. Fortenbaugh, Jr., filed.

Sept. 20, 1945. Stipulation of counsel as to contents of record on appeal, filed.

Sept. 20, 1945. Statement of S. B. Fortenbaugh, Jr., filed.

COMPLAINT.

(Filed November 26, 1943.)

(1) Defendants John M. Taylor and George H. Anderson, at all times mentioned herein were partners, doing business under the name of Taylor and Anderson Towing and Lighterage Company.

(2) Defendant, Baltimore and Ohio Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Maryland.

(3) At all the times mentioned herein, defendants, John M. Taylor and George H. Anderson owned, operated and controlled the steam tug "J. M. Taylor", engaged in the business of boat towing for hire.

(4) At all the times mentioned herein, defendant Baltimore and Ohio Railroad Company, owned and operated a certain car float, hereinafter referred to, which, upon information, plaintiff avers was identified as car float No. 72.

(5) On or about the 6th day of February, 1943, and at all times mentioned herein, plaintiff's intestate, Norman E. Hickman, was in the employ of defendants John M. Taylor and George H. Anderson, trading as Taylor and Anderson Towing and Lighterage Company, as a member of the crew of the steam tug "J. M. Taylor" in the capacity of a fireman.

(6) On or about the 6th day of February, 1943, defendants John M. Taylor and George H. Anderson, trading as Taylor and Anderson Towing and Lighterage Company, were engaged by defendant, Baltimore and Ohio Railroad Company, to tow the said car float No. 72, from Pier 12, North Wharves in the city of Philadelphia, to a point on the opposite side of the Delaware River and the steam tug "J. M. Taylor" was assigned to perform the said towing job.

(7) On or about the 6th day of February, 1943, the steam tug "J. M. Taylor" commenced to tow the said car float from Pier 12, North Wharves, Philadelphia, out into the Delaware River and while so engaged the said car float foundered and sank.

(8) The line which secured the tug "J. M. Taylor" to the sunken car float remained intact and the tug thereafter continued to be attached to the car float by means of the said line.

(9) Subsequent to the foundering as aforesaid, the said car float rose to the surface several times and on February 7, 1943, at or about 6:00 A. M. o'clock, the car float again rose to the surface beneath the said tug causing the tug to founder and sink to the bottom of the Delaware River.

(10) Plaintiff's intestate, Norman E. Hickman, was carried down with the tug and drowned as a result thereof, after enduring great pain and suffering.

(11) The death of Plaintiff's intestate was due to the negligence of the defendants and the unseaworthiness of the vessels and in failing to take proper precautions to avoid the foundering of the car float No. 72 and of the tug "J. M. Taylor", and in failing to take proper precautions for the safety of the deceased and other members of the crew.

(12) During the period that plaintiff's intestate was employed, he well and truly performed all his duties in a satisfactory manner.

(13) Immediately prior to his death, the decedent was a strong, robust and able-bodied man with the prospect of substantial advancement in earning capacity.

(14) The deceased left surviving him as his heirs at law and next of kin, his father, George E. Hickman, age 57 and his mother, Mary Hickman, age 53.

(15) George E. Hickman, a citizen of the State of Pennsylvania, father of the deceased, was duly appointed administrator of his estate by the Register of Wills of Philadelphia County on November 9, 1943.

FIRST CAUSE OF ACTION.

(16) Plaintiff brings this action on behalf of the persons named in Article (14) hereof under and by virtue of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. 688).

SECOND CAUSE OF ACTION.

(17) Plaintiff brings this action on behalf of the persons named in Article (14) hereof under and by virtue of the Pennsylvania State Act of 1855 P. L. 309 as amended.

THIRD CAUSE OF ACTION.

(18) Plaintiff also brings this action on behalf of the Estate of Norman E. Hickman, deceased, under and by virtue of the Pennsylvania State Act of 1937 P. L. 2755.

Wherefore George E. Hickman, as administrator of the Estate of Norman E. Hickman, deceased, claims the sum of $100,000.00 damages.

FREEDMAN AND GOLDSTEIN,

By ABRAHAM E. FREEDMAN.

ANSWER OF DEFENDANT, THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Filed December 17, 1943.)

First Defense.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense.

The plaintiff's decedent had knowledge of and assumed the risks incident to his employment, and the injuries alleged to have been sustained by the plaintiff's decedent arose from and were caused by said risks.

Third Defense.

This defendant, The Baltimore and Ohio Railroad Company, admits the allegations contained in paragraphs 1, 2, 3, 6, 7, and that part of paragraph 4 which avers that this defendant owned the carfloat identified as No. 72; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 8, 9, 10, 12, 13, 14 and 15; denies the remaining allegations of paragraph 4 and each and every allegation of paragraph 11 and denies that the death of plaintiff's intestate was due in any manner to any negligence on the part of this defendant.

Fourth Defense.

And for further defense this defendant avers that at the time of the happening of the accident described in the complaint the said carfloat No. 72 was not in the custody or under the control of this defendant.

J. F. Shrader,
Attorney for the Baltimore and Ohio Railroad Company.

ANSWER OF JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO.

(Filed December 29, 1943.)

(1) Admitted.

(2) Admitted.

(3) It is admitted that John M. Taylor and George H. Anderson, individually, own shares in the steam tug "J. M. Taylor" and that, as a partnership trading as Taylor & Anderson Towing & Lighterage Co. they operated the steam tug "J. M. Taylor" at the times set forth in the Complaint.

(4) Admitted.

(5) Admitted.

(6) Admitted. It is further averred that the Tug "Philadelphia" was also assigned to perform the job of towing the Car Float #72 from Pier 12, North Wharves to the Quigley Shipyard at Cooper's point, Camden, New Jersey, which is approximately on the opposite or New Jersey side of the Delaware River.

(7) and (8). Denied, except as hereinafter averred. On February 8, 1943 at about 4:00 P. M., the Tugs "Philadelphia" and "J. M. Taylor" undertook the towage of the Car Float #72 in accordance with the instructions of the Baltimore & Ohio Railroad. The Car Float #72 had been damaged in manner unknown to the Defendants, Taylor & Anderson Towing & Lighterage Co., and was grounded and filled with water at its berth at Pier 12 when the tugs arrived. The Tug "Philadelphia" put its line to the river end of the car float, which was submerged, and the Tug "Taylor" put its line to the Tug "Philadelphia", and, in this manner, proceeded to tow directly across the river. Finally, however, the car float caught up and one of the two towing hawsers

to the Tug "Philadelphia" parted. Thereupon the Tug "Taylor" returned to Pier 12 for instructions in accordance with which it took over the hawser from the car float to the Tug "Philadelphia". The Tug "Taylor" proceeded to stand watch during the night for the dual purpose of warning other navigation and of protecting the car float against collision damage.

(9) It is denied that the Car float #72 rose to the surface several times prior to 6:00 A. M. on February 7, 1943. It is admitted that shortly before that time the car float did rise to the surface beneath the Tug "Taylor", causing the tug to founder and sink to the bottom of the Delaware River.

(10) It is admitted that the body of Norman E. Hickman was found aboard the tug when she was raised, and that his death was due to drowning.

(11) It is denied that the death of Plaintiff's intestate was due to the negligence of Defendants, Taylor & Anderson Towing & Lighterage Co., or to the unseaworthiness of the Tug "J. M. Taylor", or to any negligence or any actions or omissions on the part of the Defendants, Taylor & Anderson Towing & Lighterage Co., or any officer or member of the crew of the Tug "J. M. Taylor". It is denied that there was any failure to take proper precautions by the Defendants, Taylor & Anderson Towing & Lighterage Co., for the safety of the deceased and other members of the crew.

(12) Admitted.

(13) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of Paragraph (13) and demand due proof thereof upon the trial of this cause.

(14) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of

Paragraph (14) and demand due proof thereof upon the trial of this cause.

(15) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of Paragraph (15) and demand due proof thereof upon the trial of this cause.

(16) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. 688).

(17) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of the Pennsylvania State Act of 1855, P. L. 309 as amended.

(18) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of the Pennsylvania State Act of 1937 P. L. 2755.

WHEREFORE, Defendants, Taylor & Anderson Towing & Lighterage Co., deny the claim of the Administrator of the Estate of Norman E. Hickman, Deceased, in the sum of $100,000., or in any sum whatsoever, and respectfully submit that the Complaint should be dismissed with costs to the Defendants.

SHIELDS, CLARK, BROWN & MCCOWN,

By S. B. FORTENBAUGH, JR.,

Attorneys for John M. Taylor and George H. Anderson, Individually and trading as Taylor & Anderson Towing & Lighterage Co.

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY DEFENDANTS, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR AND ANDERSON TOWING AND LIGHTERAGE CO.

(Filed November 27, 1944.)

(1) State the date when Norman E. Hickman first entered your employ and set forth the full period of his employment record with you.

(a) State his rating and rate of earnings and the full amount of earnings of the decedent, Norman E. Hickmon, during the period he was in your employ.

(2) State whether Norman E. Hickman satisfactorily performed all of his duties while in your employ. If your answer be in the negative, state in what respects he failed to satisfactorily perform said duties, giving the exact incidents and dates.

(3) State when Norman E. Hickman first became employed aboard the Tug "J. M. Taylor", in what capacity and rate of pay; whether he ate and slept aboard the said vessel and the nature of any voyages or trips made by him on the said vessel.

(4) State whether any shipping articles, agreement or any record was made covering the decedent's employment on the Tug "J. M. Taylor". Attach hereto a photostatic copy of any such shipping articles, agreement or document. If oral, set forth in detail the full and exact nature of any such arrangement.

(5) State to what watch the decedent, Norman E. Hickman, was assigned aboard the Tug "J. M. Taylor".

(6) Set forth the names, addresses and ratings of all of the members of the crews of the Tugs "J. M. Taylor" and "Philadelphia" as of February 6, 1943.

(7) Set forth the nature of the trip which the "J. M. Taylor" had made immediately prior to her undertaking the towing of the car float across the Delaware on February 6, 1943.

(8) State the purpose of and the exact circumstances under which the Tugs "J. M. Taylor" and "Philadelphia" were assigned to tow the car float across the Delaware River on February 6 and 7, 1943.

(9) State what agreement was entered into between you and any other person and/or company for the towing of the car float across the Delaware on February 6 and 7, 1943. If said agreement was in writing, attach hereto a photostatic copy of any such writing or document, specifying also names and adresses of all persons involved in any such agreement. If said agreement was not in writing, state in detail the exact nature of any agreement or understanding, whereby the said car float was to be towed across the river, stating specifically all of the persons and their capacities and addresses who were involved in any such arrangements or who participated in any way in any such arrangements.

(10) State what instructions were given the Captains of the Tugs "J. M. Taylor" and "Philadelphia" relative to the tow of the submerged car float and when and by whom such instructions were given.

(11) State the condition of the car float which was to be towed across the river, how and where it was situated and what method was to be used and the manner in which it was to be towed.

(12) Describe and explain in detail the construction of the car float stating:

(a) The particular devices and means used to provide buoyancy;

(b) The maximum load it was designed to carry;

(c) How much freeboard there was when the car-float was fully loaded and how much when entirely unloaded;

(d) Whether any additional devices were used to provide extra buoyancy when the carfloat was loaded.

(13) Explain how the car float became submerged.

(14) Set forth in detail and verbatim the information or instructions that were given the Captains of the Tugs "J. M. Taylor" and "Philadelphia" with regard to the condition of the car float, the nature and cause of its sinking, stating:

(a) When and by whom such information or instructions were given;

(b) Were either of these Captains informed of the possibility of the submerged car float surfacing? Set forth the nature and details of such information.

(15) State where the said car float was to be towed.

(16) State the points from which the said car float was to be towed to the point of destination.

(17) State whether a diver was sent below to examine the submerged car float or for any other purpose, and attach a photostatic copy of any report he may have submitted or which may have been submitted by anybody based on his examination or relative thereto.

(18) Set forth in detail the circumstances surrounding the commencement of the towing operation:

(a) What facilities or vessels were used;

(b) If hawsers were used, state the manner in which they were secured to the car float and the points at which such hawsers were secured;

(c) State whether the said car float was towed while it was submerged or while it floated on the water;

(d) Set forth the arrangements in detail to be followed in the towing operation, pointing out the part to be played by each of the Tugs "J. M. Taylor" and "Philadelphia", the positions they were to take, the lines each was to secure to the car float.

(e) Set forth the details of any arrangement or agreement between the Captains of the two tugs with relation to this operation.

(f) State whether the said car float came to the surface at any time after being submerged and before the occasion when the Tug "J. M. Taylor" was subsequently overturned. If said car float did come to the surface, on how many occasions did this occur; state the circumstances under which it so arose, the exact times and the periods of time it remained on the surface and the points where it came to the surface.

(19) State whether the towing operation was discontinued before arrival at the destination, and if so, specify the point as closely as possible where said operation was stopped, stating:

(a) The reason therefor;

(b) What was done by each of the Tugs "J. M. Taylor" and "Philadelphia";

(c) Whether the Tug "J. M. Taylor" cast off its lines or maintained connection with the said car float;

(d) At what time and date did the Tug "J. M. Taylor" take up its post with relation to the sunken car float in the stream?

(e) From whom did the Captain of the Tug "J. M. Taylor" receive instructions with regard to the car float which had again submerged in the stream; where and when were such instructions given; and set forth such instructions in detail and verbatim.

(20) If the said Tug "J. M. Taylor" maintained or resumed its connection with the said car float while it was resting on the bed of the river, state:

(a) The nature of the hawsers which connected the two vessels, and where and when such hawsers were secured;

(b) The length of the said hawsers;

(c) Whether the anchor of the Tug "J. M. Taylor" was in the water, and the type of anchor used;

(d) Whether the said Tug "J. M. Taylor" was north or south of the said car float or if said positions cannot be so described, set forth the relative positions of the two vessels;

(e) Whether the Tug "J. M. Taylor" was drifting with the current and tide at the time, and state the direction and speed of the current and tide;

(f) Whether any of the hawsers secured to submerged car float snapped and when and under what circumstances.

(21) State whether any arrangements were entered into with any other person and particularly with the other defendant, the B. & O. Railroad Company, with respect to maintaining the Tug "J. M. Taylor" in the river at the point where the submerged car float appeared to be obstructed in the river. If any new arrangements were entered into, state exactly what such arrangements were and the names and addresses and capacities of all persons who participated in any such arrangements.

(22) State the time as closely as possible, when the Tug "J. M. Taylor" sank in the water.

(23) State in detail all of the circumstances leading up to the sinking of the Tug "J. M. Taylor".

(24) State the facts which resulted in the sinking of the said Tug "J. M. Taylor".

(25) State the cause of the sinking of the Tug "J. M. Taylor".

(26) State whether a diver was sent out to examine the submerged car float or the sunken Tug "J. M. Taylor", giving his name and address. State whether or not he refused to go below at the scene of the sinking and why and whether he subsequently did go below. Attach a copy of any report, memorandum, or statement submitted by him in connection therewith.

(27) State whether the decedent, Norman E. Hickman, was in his bunk and asleep at the time the Tug "J. M. Taylor" sank.

(28) State for how long the decedent, Norman E. Hickman, had been in his bunk prior to the sinking of the Tug "J. M. Taylor".

(29) State in detail what efforts were made to save decedent, Norman E. Hickman, both before and after the tug sank, and when and by whom any such efforts were made.

(30) State whether he was in his bunk at the time the towing operation was undertaken.

(31) State whether any order was given to abandon the vessel "J. M. Taylor" prior to the time it sank.

(32) State whether any warning whatever was given to the decedent prior to the sinking of the said vessel "J. M. Taylor". If any such warning was given, state exactly the nature of any such warning and the name and address of all persons who participated in giving such warning, and the exact time it was given.

(33) State whether Norman E. Hickman was subsequently removed from the said tug and if so, state whether he was found in his bunk.

(34) Did the submerged car float surface or give any indication of an effort to surface while the Tug "J. M.

Taylor" was maintaining a watch in the stream? When, how many times, and with what results?

(35) Did the car float surface at any time after the Tug "J. M. Taylor" sank and before the latter was raised? When and how many times and what were complete circumstances?

(36) State whether the Tug "J. M. Taylor" was subsequently salvaged and if so, specify the date and the persons who participated in the salvaging operation.

(37) State whether any inspection was subsequently made of the "John M. Taylor" after its salvage to determine the cause of the sinking and if so, set forth complete copies of any reports in this connection, or if oral, state the details of any such inspections.

(38) State whether any statements of the members of the crews of the Tugs "J. M. Taylor" and "Philadelphia" or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug "John M. Taylor". Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

(39) State whether there is any ship's log, diary, memorandum, or record maintained by either of the Captains of the Tugs "J. M. Taylor" and "Philadelphia", having any bearing on or connection with this transaction and incident. Attach photostatic copies of such data to your answer.

FREEDMAN AND GOLDSTEIN,

By ABRAHAM E. FREEDMAN.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF TO BE ANSWERED UNDER OATH BY THE DEFENDANT, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO.

(Filed January 15, 1945.)

(1a) State whether you or your representatives have any knowledge or information as to whether any survey, examination or inspection was made of the Tug "J. M. Taylor" after it was raised from the Delaware River.

(2a) State whether you or your representatives have any knowledge or information as to whether any oral or written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the towing operation, sinking, salvaging and repair of the said tug and car float, the death of the deceased and any other matter related to the accident and incidents involved herein.

(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) If your answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or

rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different.

FREEDMAN AND GOLDSTEIN,

By /S/ ABRAHAM E. FREEDMAN,
Counsel for Plaintiff.

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY DEFENDANTS, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR AND ANDERSON TOWING AND LIGHTERAGE CO.

(Filed January 17, 1945.)

Respondents, J. M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing and Lighterage Company, answer and except to the interrogatories propounded on behalf of Libellant as follows:

1. Norman E. Hickman first entered Respondent's employment in September 1939 and continued until February 7, 1943.

(*a*) Norman E. Hickman's rating while employed by Respondents was fireman. His rate of wages was as follows:

1939-41—$110.00 per month
1941-42— 117.50 per month
1942-43— 135.00 per month

The full amount of his earnings while employed by Respondents was $6422.01.

2. While employed by Respondents Mr. Hickman performed his duties as fireman satisfactorily.

3. Mr. Hickman began work on the Tug "J. M. Taylor" on January 22, 1943. His capacity and rate of pay were as set forth in answer to interrogatory #1. While employed on the "J. M. Taylor" Mr. Hickman ate and slept aboard the vessel, both when she was in operation and when tied up at night. At the time of his employment on the "J. M. Taylor" she was engaged in general towage work in the Port of Philadelphia with occasional trips to Baltimore.

4. Mr. Hickman did not sign any shipping articles or written agreement or document of employment. He was hired orally.

5. Mr. Hickman's watch on board the Tug "J. M. Taylor" was from 6 P. M. to 12 midnight.

6. The names, addresses and ratings of all of the members of the crews of the "J. M. Taylor" and "Philadelphia" as of February 6, 1943 were as follows:

Tug "J. M. Taylor":

Captain	Alton Murray Glen Burnie P. O. Marley Park, Md.
Mate	Philip W. West, Jr. 30 S. 22nd St. Philadelphia, Pa.
Engineer	Walter Quillen 5226 Chancellor St., Philadelphia, Pa.
2nd Eng.	John H. Long 5442 Webster St. Philadelphia, Pa.
Cook	Alpheus Dixon 904 S. 46th St. Philadelphia, Pa.
Fireman	Norman Hickman 122 N. Dewey St. Philadelphia, Pa.
Fireman	Andrew Benekos 311 Gaskill St. Philadelphia, Pa.
Deckhand	Olie Knutson 211 Walnut St. Philadelphia, Pa.

Deckhand	Russell Savage 5229 Chancellor St. Philadelphia, Pa.

Tug "Philadelphia":

Captain	Valorous M. Hudson 1101 Longacre Blvd. Yeadon, Pa.
Chief	Esmau Hudson Bishopville, Md.
Fireman	Everett Murray 221 Pine St. Philadelphia, Pa.
Fireman	John Hickman 321 S. 3rd Street Philadelphia, Pa.
Fireman	Preston Long 5300 Delancey St. Philadelphia, Pa.
Deckhand	Frank Bennett 5346 Webster St. Philadelphia, Pa.
Cook	John Lamb 30 School Ave. Upper Darby, Pa.

7. Respondents except to the seventh interrogatory as asking for information irrelevant to the issues raised by the pleadings in this case.

8, 9, 10. On the afternoon of February 6, 1943, Respondents received an order by telephone from Mr. J. H. Murray, General Marine Superintendent of the Baltimore & Ohio Railroad Company, 25 Broadway, New York City, to tow a carfloat from Pier 12, North Wharves, Delaware River, to Quigley's Shipyard, Cooper's Point, Camden, New Jersey. Pursuant to this oral order Respondents dispatched the Tugs "J. M. Taylor" and "Philadelphia" to Pier 12, North

Wharves, to conduct the towing operation in accordance with the orders of responsible agents of the Baltimore & Ohio Railroad at the pier. These instructions were given by George H. Anderson, one of the Respondents, and the captains of the tugs were instructed to report to Mr. J. H. Murray and Mr. Roy Bronski at the pier and tow the carfloat as directed by them.

11. The carfloat, Baltimore & Ohio Railroad No. 72, which was to be towed by the Tugs "J. M. Taylor" and "Philadelphia" on February 6, 1943, on arrival of the tugs, was observed to be submerged at its berth at Pier 12 with the outer river end out of sight under the water. Freight cars were being removed. Respondents knew only that the carfloat was constructed of wood without bulkheads and seemed in all respects of usual type. The manner in which the Tugs "J. M. Taylor" and "Philadelphia" were instructed by Mr. J. H. Murray of the Baltimore & Ohio Railroad to tow the carfloat and the manner in which it was actually towed was as follows: A diver supplied by the Baltimore & Ohio Railroad attached two towing hawsers to the carfloat at the river end. These hawsers were taken by the Tug "Philadelphia" on her stern towing bitts and a line was also run from the bow bitts of the Tug "Philadelphia" to the stern bitts of the Tug "J. M. Taylor". The tow made up in this manner proceeded directly across the river toward its destination.

12, 13. Respondents except to these interrogatories as calling for information of which they do not have knowledge or means of knowledge.

14. The information and instructions given to the captains of the Tugs "J. M. Taylor" and "Philadelphia" with regard to the condition of the car float and the nature and cause of its sinking were received by them from Mr. J. H. Murray of the Baltimore & Ohio Railroad. Captain Alton Murray of the Tug "J. M. Taylor" was simply told that the

car float would rise to the surface when freed from the mud at her berth along the pier. In addition, Mr. J. H. Murray of the Baltimore & Ohio Railroad had informed George H. Anderson, one of the Respondents, by telephone when placing the order for towage that the carfloat was filled with water and was to be towed to the shipyard for repairs.

15. The carfloat was to be towed to Quigley's Shipyard, Cooper's Point, Camden, New Jersey.

16. The carfloat was to be towed from Pier 12, North Wharves, Delaware River, Philadelphia.

17. As stated in the answer to interrogatory #11, a diver supplied by the Baltimore & Ohio Railroad attached the towing hawsers to the submerged river end of the carfloat. Respondents do not have any knowledge or means of knowledge as to whether this diver made any examination of the carfloat or made any report, and accordingly except to that part of this interrogatory asking for this information.

18. a. The Tugs "J. M. Taylor" and "Philadelphia".

b. Two hawsers were attached at the river end to the carfloat on cleats and a bitt.

c. At the commencement of the towage, the shoreward end of the car float was above water, but as soon as pulled clear of the pier the entire float submerged.

d. and e. The arrangements between the captains of the Tugs "Philadelphia" and "J. M. Taylor" were that as soon as the carfloat was towed into the river free of the pier, the "J. M. Taylor" was to let go her hawser to the bow of the "Philadelphia" and come alongside the carfloat and make fast so as to be in a position to handle the carfloat in docking her on arrival at the shipyard. These arrangements could not be carried out for the reasons stated in the answer to interrogatory No. 18 c. as the carfloat was submerged.

f. Respondents do not know of any occasion on which the carfloat came to the surface until after the "J. M. Taylor" sank.

19. The towing operation was discontinued before arrival at destination because the carfloat hung up on an obstruction in the river, presumably the bottom at a point about 200 yards north of the Delaware River Bridge on the eastern side of the channel.

a. The carfloat was on the bottom and could not be towed further.

b, c, and d. After the grounding, the Tug "J. M. Taylor" cast off its line to the Tug "Philadelphia" and returned to Pier 12 to report the situation to the B. & O. employees in charge and receive instructions. The Tug "Philadelphia" in the meantime kept its remaining hawser upon the sunken carfloat, one hawser having parted when the float hung up. At Pier 12 Tug "J. M. Taylor" was ordered to return to the sunken carfloat to relieve the Tug "Philadelphia" and stand by displaying danger signals in order to mark the sunken car float and to protect passing navigation. The Tug "Taylor" took up its position in this manner between 6 and 7 P. M., February 6, 1943.

c. The captain of the "J. M. Taylor" was ordered by Mr. J. H. Murray of the Baltimore & Ohio Railroad to stand by the submerged carfloat.

20. a. The hawser connecting the Tug "J. M. Taylor" to the sunken carfloat was the five inch manila rope which had been one of the towing hawsers of the Tug "Philadelphia".

b The hawser was about 40 fathoms long.

c. No anchor was used.

d. The Tug "J. M. Taylor" was in different positions relative to the carfloat as effected by wind and tide.

e. The Tug "J. M. Taylor", while standing by the sunken carfloat, kept full head of steam on its engine and maneuvered from time to time. The state of tide and speed of current varied from time to time while the "Taylor" was standing by the carfloat.

f. One of the hawsers from the Tug "Philadelphia" to the carfloat broke at the time the carfloat hung up.

21. Information asked for in this interrogatory has been supplied in answer to interrogatory #19 e. No other arrangements were made.

22. The Tug "J. M. Taylor" sank about 6 A. M., February 7, 1943.

23. Shortly before 6 A. M. on February 7, 1943 the Tug "J. M. Taylor" without warning and for an unknown cause took a slight roll. Captain Murray on duty in the pilot house of the Tug, however, alerted the crew, made certain all were on watch and the engines operating and directed the tug forward to test the line to the sunken carfloat. Everything was found in order, but shortly thereafter another slight roll was felt at which time the entire crew was called and immediately thereafter, for causes unknown to the Respondents, the "Taylor" turned over on her starboard side and sank.

24, 25. Respondents do not have knowledge or means of knowledge as to the cause of the sinking of the Tug "J. M. Taylor", except that she was apparently struck from below by the carfloat.

26. On information and belief Philadelphia Derrick and Salvage Company sent a diver out to examine the Tug "J. M. Taylor". Respondents did not receive a copy of any report memorandum or statement submitted by him in connection therewith.

27. On information and belief at the time the Tug "J. M. Taylor" sank, Norman E. Hickman was not in his

bunk, having been called by the mate after the tug took her first roll.

28. On information and belief Norman E. Hickman had been in his bunk from midnight, the time he went off watch, until called prior to the sinking of the Tug "J. M. Taylor".

29. In accordance with established practice under such circumstances, as soon as the crew of the Tug "J. M. Taylor", because of the rolling of the tug, realized that the conditions were abnormal, Norman E. Hickman and the rest of the crew were alerted as stated in the answer to interrogatory #27 but the Tug "J. M. Taylor" sank so rapidly after she started to turn over that there was no time or opportunity for any of the men on deck to take any action to rescue other men as they were all immediately cast into the water.

30. Respondents except to this interrogatory as calling for matter irrelevant to issues raised by the pleadings.

31. On information and belief no order was given to abandon the Tug "J. M. Taylor" prior to its sinking but as set forth in answers to previous interrogatories, as soon as the crew realized that conditions were unusual, the entire crew was alerted and thereafter the Tug "J. M. Taylor" sank immediately.

32. As stated in answers to previous interrogatories, the entire crew, including Norman E. Hickman, was called after the first roll that the Tug "J. M. Taylor" took. This was given by Philip West, Mate, whose address was, on May 4, 1943, 30 South 22nd Street, Philadelphia, Pennsylvania.

33. The body of Norman E. Hickman was subsequently removed from the Tug "J. M. Taylor". It was found on the floor of the forward cabin.

34. While the Tug "J. M. Taylor" was maintaining its watch, the submerged carfloat did not give any indication of an effort to surface and did not surface.

35. After the sinking of the Tug "J. M. Taylor", the carfloat did surface several times but the number is not within the knowledge or means of knowledge of Respondents. On information and belief the carfloat came to the surface some few minutes after the Tug "J. M. Taylor" sank and several times thereafter as reported in newspaper accounts at the time.

36. The Tug "J. M. Taylor" was salvaged by the Philadelphia Derrick and Salvage Company on February 13, 1943.

37. A survey was made of the Tug "J. M. Taylor" after she was hauled out on drydock at the shipyard. Respondents except to that part of [illegible]s interrogatory asking for copies of reports of survey as privileged matter being made in preparation for litigation.

38. Respondents except to this interrogatory as calling for privileged matter obtained in preparation for litigation. Statements were taken.

39. All memoranda or records maintained by the captain of the Tug "J. M. Taylor", her ship's log and diary were lost in the sinking.

SHIELDS, CLARK, BROWN & MCCOWN,

By /s/ S. B. PORTENBAUGH, JR.,
Attorneys for John M. Taylor and George H. Anderson, Individually and trading as Taylor & Anderson Towing & Lighterage Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.:*

GEORGE H. ANDERSON, one of the Respondents, being duly sworn according to law, deposes and says that the statements of fact contained in the foregoing answers to interrogatories are true and correct to the best of his information and belief.

/s/ GEORGE H. ANDERSON.

Sworn to and subscribed before me this 16th day of January, 1945.

/s/ ANNE E. DONAHUE,
(Seal) *Notary Public.*

My com. exp. 3/21/47.

ANSWERS OF JOHN M. TAYLOR AND GEORGE H. ANDERSON TO ORIGINAL AND SUPPLEMENTAL INTERROGATORIES OF THE PLAINTIFF.

(Filed January 25, 1945.)

7. At 3.15 A. M. on February 3, 1943, the Tug "J. M. Taylor" left the Sinclair Dock at Philadelphia with the Sinclair Oil Barge "No. 1" and arrived at Annapolis, Maryland at 11.15 A. M. The tug left Annapolis on February 5, 1943 at 8.00 A. M. and arrived at Philadelphia at 11.55 P. M. on the same day. The tug was thereafter tied up at Pier 28, South Wharves, Philadelphia until 10.30 A. M. on February 6, 1943, when it was ordered to report at the Baltimore & Ohio Pier No. 12 to remove a derrick hung up on the carfloat. The derrick, however, freed itself before the tug's arrival and the Tug "J. M. Taylor" returned to Pier 28 where it was tied up until it again reported to Pier 12 and undertook the towage as aforesaid.

8, 9 & 10. George H. Anderson, partner in the Defendant firm of Taylor & Anderson Towing & Lighterage Co.,

represented his firm in the telephone conversations with Mr. J. H. Murray on February 6, 1943.

30. Defendants, Taylor & Anderson Towing & Lighterage Co., do not know whether the deceased, Norman E. Hickman, was in his bunk at the time the towing operation was undertaken. Defendants, Taylor & Anderson Towing & Lighterage Co., do know that Norman E. Hickman was standing the watch from 6.00 P. M. to 12 Midnight and from 6.00 A. M. to 12 Noon. The tug was carrying a double crew. Upon information and belief, the deceased was called for breakfast at 5.30 A. M. on the day of his death.

(1a.) Survey was made of the Tug "J. M. Taylor" after it was raised from the Delaware River. There is attached copy of the damage survey on the Tug "J. M. Taylor".

(2a.) Shields, Clark, Brown & McCown, as the legal representatives of the Defendants, Taylor & Anderson Towing & Lighterage Co., interviewed the survivors of the Tug "J. M. Taylor" in the course of their investigation of the accident for the purpose of defending any litigation which might arise therefrom. In addition, a hearing was held before the United States Steamboat Inspectors at which the testimony of all survivors and other witnesses was recorded.

(3a.) The investigation of the sinking of the Tug "J. M. Taylor" on February 7, 1943 was entirely supervised and conducted by counsel for the Defendants, Taylor & Anderson Towing & Lighterage Co. Any and all statements taken were in the course of preparation by counsel for possible litigation. Defendants, Taylor & Anderson Towing & Lighterage Co., except to Interrogatory (3a.) in that it requires the disclosure of entirely irrelevant, immaterial and inadmissible information in an attempt to obtain indirectly counsel's private files. The answering of the very minute and detailed interrogatory would involve practically turn-

ing over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.

SHIELDS, CLARK, BROWN & MCCOWN,
By S. B. FORTENBAUGH, JR.,
Attorneys for John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.:*

GEORGE H. ANDERSON, being duly sworn according to law, deposes and says that he is one of the partners of the firm of Taylor & Anderson Towing & Lighterage Co., one of the Respondents in the foregoing action; that he has read the foregoing answers to interrogatories, and that the statements contained therein are true and correct to the best of his information and belief.

GEORGE H. ANDERSON.

Sworn to and subscribed before me this 22nd day of January, A. D. 1945.

EMMA B. GANTZ,
Notary Public.

(Seal)

My Commission Expires May 3, 1948.

February 24, 1943

TUG "J. M. TAYLOR"

Damage Survey while Tug on Railway at Kensington Shipyard & Drydock Corporation February 19th, 1943, to ascertain damage alleged to have been sustained through accident February 7th, 1943, in Delaware River opposite Vine Street, Philadelphia.

Rudder and Rudder Post

Rudder broken off at stock and missing.

Stern frame broken at heel where same joins shell plating. Also at top end of stern post.

The rudder to renew in its entirety.

The stern frame to be cut back into the shell and portion of stern frame to renew.

Sea Valves

Open up sea valves for examination, clean out and close up.

Bulwark

Steel bulwark rail dislodged, rail and bulwark stanchions broken—To force back into place and weld.

House side

Indented, starboard side—To release and fair.

Wood Bulkheads

Bulkheads in way of house where distorted to repair.

House Doors

House doors where bent or badly buckled to be faired or part renewed as found necessary and all doors made workable.

Main House Top

To renew from after end of Captain's room to after end of deck house.

Engine Room Skylight

To be renewed in its entirety.

Life Boat

Salvaged life boat to be replaced on top of engine room skylight renewing chocks, grips and complete equipment for boat, also life boat cover.

Boat Davits

The 2 boat davits missing—To renew same including sockets, brackets, guy wires and falls.

House Hand Rails

To renew where missing and repair where bent.

Stack

Salvaged stack to be repaired with part new material and reinstalled and connected to uptakes, renewing guy wires.

Ventilators

Renew boiler room ventilators, cowls, stumps and pipe leading to spaces below.

Revolving vent exhauster from engine room to renew.

Galley Smoke Pipe

To renew, together with deck coaming.

Pilot House and Captain's Room (Wood Construction)

Remove the remaining parts of the pilot house and Captain's room and reconstruct complete new pilot house and Captain's room, together with all missing furniture and fittings.

Masts

Foremost and mainmast missing—To renew in their entirety with stays.

Steering Gear Controls

The stand in the pilot house and control rods leading to engine to be overhauled, repaired, realigned and put in operating condition.

The after steering stand to repair, resecure, and connect control rods as before.

Side Light Boxes

Missing—To renew.

Bell Pulls and Voice Tubes

Repair bell pulls and speaking tubes as found necessary, renewing any missing parts.

Searchlight.

Searchlight missing—To renew, operated from inside of pilot house.

Galley

All wood work in galley where distorted to be repaired as found necessary and missing parts of galley stove renewed.

Forward Quarters

Repair wood work and berths as necessary.

Engineer's Quarters, Aft

Remove wood work and berths and repair or renew as necessary.

Steering Gear

Open up steering engine, rods, chains and sheaves leading aft, examine, overhaul and repair as found necessary and relag cylinder.

Machinery

Open up all machinery for examination, clean and if found in order, close up.

Generator (Moon)

Take Turbo Generator to shop, overhaul, bake out armature and coils, repair, test out and prove in good order.

Electrical Work

Test out all electrical wiring and fittings and place same in good order including switchboard and navigation lights.

Heating System

Repair and renew radiators and piping leading to same as found necessary to put same in proper operating condition.

Boilers

Open up boilers and mountings, clean water and fire sides and apply working pressure hydrostatic test for U. S. Locals. Close and fill boiler ready for steam.

Uptakes

Uptakes where damaged to be faired, repaired with part new material as necessary ready to reinstall stack.

Asbestos Lagging

Renew asbestos lagging on boiler and where missing on piping.

Steam and Water Piping

To be tested out, cleaned and proven in good order.

Floor Plates

Replace floor plates where dislodged.

Cleaning

The entire vessel to be cleaned, removing mud from all bilges and upon completion of repairs to be left clean and in orderly condition.

Painting in General

All new and disturbed work to be painted as originally.

Coal

Remove approximately 20 tons of coal from bunkers and afterwards replace.

Removals

Necessary removals to effect repairs to be reinstalled.

Drydocking

Necessary to effect above repairs.

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY THE B. & O. RAILROAD CO. UNDER OATH.

(Filed November 27, 1944.)

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(1) State the time when and the circumstances under which the car float involved in the instant case was first submerged in the water.

(2) State whether the said car float was loaded when it submerged and exactly what the said load consisted of. What arrangements were made for the removal of the load before the car float was to be towed and was the load removed? If so, when?

(3) State whether or not a diver was sent below to examine the submerged float and to attach lines thereto and who arranged for this to be done. Set forth the results of the diver's examination and give the name and address of the diver. Attach to your answer hereto a copy of any report, memorandum, or statement made by the diver or on his behalf.

(4) State whether the said car float required any repairs at that time and if so, state the nature of any such repairs and what arrangements were entered into for effecting such repairs.

(5) State whether any arrangements or agreements, oral or written, were entered into for the towing of the said car float across the river and to any specified destination. State exactly the nature of such arrangements, when and by whom such arrangements were made, giving the names and addresses of all persons who entered into said arrangements and understandings. If written, attach a copy thereof to your answer hereto.

(6) State whether the said car float was submerged or was afloat in the water prior to its being towed.

(7) State whether you or any of your representatives participated in the actual towing or gave any instructions whatever in connection with the towing of the said car float across the river. If your answer be in the affirmative, state in detail all such instructions and participation, giving the names and addresses of all persons involved.

(8) State whether any of your representatives, or anybody on your behalf, was on the scene during any part of the towing operations. Did such observer submit any report or memo? Attach a copy thereof to your answer hereto.

(9) State whether one or more vessels were used to tow the said car float across the river, giving the names of the said vessels.

(10) State whether the said car float came to the surface at any time prior to the occasion when the Tug "J. M. Taylor" was subsequently overturned. If so, state the point at which it so came to the surface, the exact time and the period of time it remained on the surface and whether it again sank.

(11) State whether the said car float subsequently became stuck in the river. If so, state the place and time when same took place.

(12) State whether you were advised that the car float was stuck in the river, whether you were asked for further instructions, and by whom. State exactly what said request was, and if you gave any further instructions or advices, state exactly what such instructions and advices were and the names and addresses of all persons who participated in said arrangements and who rendered such instructions and advices.

(13) State whether you ordered or authorized the Tug "J. M. Taylor" to stand by the car float after it was stuck in the river, and detail the exact instructions given in this connection.

(14) State whether the car float subsequently overturned the Tug "J. M. Taylor". If the Tug "J. M. Taylor" was overturned because of some other fact, explain in detail such other fact or cause.

(15) State whether a diver was sent out to examine the submerged car float or the sunken Tug "J. M. Taylor", giving his name and address. State whether or not he refused to go below at the scene of the sinking and why and whether he subsequently did go below. Attach a copy of any report, memorandum, or statement submitted by him in connection therewith.

(16) State the exact size, weight and construction of the said car float. Attach hereto a drawing or blueprint of said car float, showing its construction, and if you are possessed of any photograph of said car float, attach hereto a copy of said photograph or advise where same can be inspected.

(17) Describe and explain in detail the particular devices and means used to provide buoyancy for the car float, stating:

(a) the maximum load it was designed to carry;

(b) how much freeboard there was when the car float was fully loaded and how much when entirely unloaded;

(c) whether any additional devices were used to provide extra buoyancy when the car float was loaded.

(18) When and by whom was this car float built, and when and from whom was it purchased by you?

(19) State from any knowledge or information in your possession the reason for the bobbing up of the car float on the different occasions prior to and subsequent to the sinking of the "J. M. Taylor".

(20) Attach hereto copies of any memoranda, reports or statements available to you or in your possession, relating to the towing, bobbing or sinking of the car float or in connection with the sinking of the Tug "J. M. Taylor".

FREEDMAN AND GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF TO BE ANSWERED UNDER OATH BY THE DEFENDANT, B. & O. RAILROAD CO.

(Filed January 15, 1945.)

(1a) State whether you or any of your representatives have any knowledge or information as to whether any surveys, examinations or inspections were made of the car float before the towing operation was begun at any time thereafter, while the float was submerged or after it was raised from the water after the accident whereby the Tug "J. M. Taylor" was sunk.

(2a) State whether you or your representatives have any knowledge or information as to whether any oral or written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the condition of the float, its submerging and the cause of the submerging before the towing operation began; arising out of the towing operation; the sinking, salvaging and repair of the said car float after the towing operation was begun; relating to the bobbing up and submerging of the float while in the Delaware River after the towing operation was begun; relating to the death of the deceased and any other matter related to the accident and incidents involved herein.

(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) if your answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different.

FREEDMAN & GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN,

Counsel for Plaintiff.

ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY UNDER OATH TO THE INTERROGATORIES PROPOUNDED BY THE PLAINTIFF.

(Filed December 21, 1944.)

1. Answering the first interrogatory, this defendant says, in the early morning of February 5, 1943 on the north side of Pier 12, Philadelphia.

2. Answering the second interrogatory, this defendant says the car float was loaded with five empty refrigerator cars and one empty box car. Defendant employed the Philadelphia Derrick & Salvage Corporation to remove the cars from the float while she was in her submerged condition and that corporation finished removing all cars on the evening of February 6.

3. Answering the third interrogatory, this defendant is informed that a diver was sent below to examine the submerged float; but this was not done by this defendant, and this defendant is ignorant as to what were the results of the diver's examination, and does not know the name or address of the diver. No report, memorandum or statement made by the diver or on his behalf was furnished to this defendant.

4. Answering the fourth interrogatory, this defendant says, that no repairs were made to the float before she was towed away from Pier 12.

5. Answering the fifth interrogatory, this defendant says that on February 6 before the Philadelphia Derrick & Salvage Corporation had finished taking the cars from the float, Mr. J. H. Murray, this defendant's Superintendent of Marine Equipment, by telephone, employed defendant, Taylor & Anderson Towing & Lighterage Corporation to tow the car float from Pier 12 to the Quigley Shipyard, Inc. at Coopers Point, Camden, New Jersey, the same to be done when the Philadelphia Derrick & Salvage Corporation had finished taking the cars from the float. Mr. Murray made the arrangements over the telephone with George H. Anderson of Taylor & Anderson Towing & Lighterage Corporation and the agreement was to tow the car float with her decks awash from Pier 12 to said shipyard.

6. Answering the sixth interrogatory, this defendant refers to its answer to the fifth interrogatory and says that the car float was partly submerged with decks awash when the towing was begun.

7. Answering the seventh interrogatory, this defendant says, "no". It employed defendant, Taylor & Anderson Towing & Lighterage Corporation as an independent contractor to tow the float from Pier 12 to the Quigley Shipyard, Inc.

8. Answering the eighth interrogatory, this defendant says, "no", except that Mr. J. H. Murray was on Pier 12 when the towing was begun and for a short time thereafter. This defendant excepts to that part of the eighth interrogatory which requests the production of reports, memoranda or statements made by this defendant's employees after the happening of the accident.

9. Answering the ninth interrogatory, this defendant says that Taylor & Anderson Towing & Lighterage Corporation used their tugs PHILADELPHIA and the J. M. TAYLOR.

10. Answering the tenth interrogatory, this defendant says it doesn't know.

11. Answering the eleventh interrogatory, this defendant says it has no definite knowledge on the subject as the float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

12. Answering the twelfth interrogatory, this defendant says that while Mr. J. H. Murray was still standing on Pier 12 the tug J. M. TAYLOR returned to the pier and her master informed Mr. Murray that one of the two lines to the float had parted from chafing and that the float, entirely submerged, was stuck on the bank of the channel about 1,000 feet off the Camden shore. The master of the tug J. M. TAYLOR, an employee of Taylor & Anderson Towing & Lighterage Corporation, whose name was Alton Murray, then suggested to Mr. J. H. Murray that it would be well to have a tug stand by the wreck during the night. Mr. J. H. Murray then suggested that Mr. Alton Murray talk with his superior Captain Anderson of Taylor & Anderson Towing & Lighterage Corporation. Thereupon Mr. Alton Murray, the master of the tug J. M. TAYLOR, telephoned to his superior, Captain Anderson, and Captain Anderson later talked with Mr. J. H. Murray. Captain Anderson told Mr. J. H. Murray that in his opinion it was safe to have a tug stand by the sunken float to warn navigation, and Captain Anderson also told Mr. J. H. Murray that he thought it better to have a tug stand by than to arrange to anchor and buoy the float. Captain Anderson then said to Mr. J. H. Murray that if the Railway Company would pay the expense of the service, he would arrange to have one of his tugs stand by the sunken float. This conversation between Mr. J. H. Murray and Captain Anderson was by telephone, and after Captain Anderson had agreed to have one of his tugs stand by the float, Mr. J. H. Murray turned the telephone over to Mr. Alton Murray, the master of the tug J. M. TAYLOR, and when Mr. Alton Murray finished talking with Captain Anderson, he informed Mr. J. H. Murray that Captain Anderson had ordered him and his tug, the J. M. TAYLOR, to relieve the tug PHILADELPHIA

and to stand by the float throughout the night. And about 6 P. M. the tug J. M. TAYLOR left Pier 12 presumably to relieve the PHILADELPHIA and stand by the float during the night.

13. Answering the thirteenth interrogatory, this defendant refers to its answer to the twelfth interrogatory.

14. Answering the fourteenth interrogatory, this defendant says it has no definite knowledge on the subject as the car float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

15. Answering the fifteenth interrogatory, this defendant says that on February 8, Mr. J. H. Murray communicated with the Philadelphia Derrick & Salvage Corporation in an effort to have them raise the float and move her to Quigley Shipyard, Inc. On February 11 that corporation raised the tug J. M. TAYLOR and on February 15 it raised the float and on February 16 the float with the derricks which were holding her were towed to Quigley's Shipyard, Inc. by two tugs of Taylor & Anderson Towing & Lighterage Corporation. Defendant has no definite knowledge as to whether the Philadelphia Derrick & Salvage Corporation used a diver in the matter of raising the float.

16. Answering the sixteenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was 220 feet long, by 34 feet wide by 9 feet deep; total weight, approximately 500 to 600 tons, closest figured weight, 574 tons. It is of wooden construction, five fore and aft bulkheads constructed of 8 by 12 yellow pine. No blueprint or drawing is available, having long since been destroyed. There are no photographs of float available.

17. Answering the seventeenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was (a) designed to carry a maximum load of 500 tons, (b) approximately 4 feet freeboard when

fully loaded, and 6 feet freeboard when light or unloaded. (c) Vessel as constructed provided own buoyancy. No extra buoyancy needed when float loaded.

18. Answering the eighteenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was purchased from Robert Palmer & Son, Noank, Connecticut, and delivered at Philadelphia, Pa., in September, 1905.

19. Answering the nineteenth interrogatory, this defendant has no knowledge on the subject. The float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

20. Answering the twentieth interrogatory, this defendant excepts to the production of statements and reports of all its employees made and given after the accident, the only ones this defendant has.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By (Sgd.) P. J. HENRY.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

P. J. HENRY, being duly sworn according to law, deposes and says that he is Division Claim Agent of The Baltimore and Ohio Railroad Company, one of the defendants above named, and that the foregoing answers to Interrogatories are true and correct to the best of his knowledge, information and belief.

(Sgd.) P. J. HENRY.

Sworn to and subscribed before me the 20th day of December, 1944.

(S.) ETHEL S. SMITH,
Notary Public.

(Seal)

My Commission Expires February 3, 1945.

FURTHER ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY TO ORIGINAL INTERROGATORIES, AND ANSWERS TO SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF.

(Filed February 16, 1945.)

4. Further answering the Fourth Interrogatory, this Defendant says that this Interrogatory taken in connection with the Third Interrogatory calls for information in respect to the float before she was towed from Pier 12. As stated in the Answer to the Fifth Interrogatory, this Defendant employed Taylor & Anderson Towing & Lighterage Company to tow the float from Pier 12 to the Quigley Shipyard Inc. The float having sunk naturally, this Defendant assumed that there was some reason for it and in order to determine the reason or cause and to correct the same, this Defendant employed Taylor & Anderson Towing & Lighterage Company to tow the float to the shipyard. It was impossible for this Defendant to know at that time what, if anything, was wrong with the float or whether or not she needed any repairs. No repairs were made to the float before she was towed from Pier 12 to the Quigley Shipyard and it was not necessary to make any as it is a common practice to tow partly submerged car floats and other similar craft.

13. Further answering the Thirteenth Interrogatory, this Defendant says that it did not order or authorize the tug J. M. Taylor to stand by the car float after it was stuck in the river. It neither authorized nor ordered the tug J. M. Taylor to do anything. This Defendant did not agree to pay the Taylor & Anderson Towing & Lighterage Company for the services of a tug to stand by and watch the float but Mr. J. H. Murray did tell Captain Anderson that its insurance company or underwriters would pay for the services.

Mr. J. H. Murray's reply to the statement of Captain Anderson as set forth was that as he, Captain Anderson, had more knowledge of the river and had towed so many of the railroad company's floats in their sunken condition before, he would abide by his, Captain Anderson's, judgment. Mr. J. H. Murray did not agree that it was safe to have a tug stand by the sunken float and he did not agree that it was better to have a tug stand by than to arrange to anchor and buoy the float. He employed Taylor & Anderson Towing & Lighterage Company to perform the service of marking and watching the float as in their judgment it should be performed.

15. Further answering the Fifteenth Interrogatory, this Defendant says that some time after the float had been raised and towed to the Quigley Shipyard Inc. it received a bill from the Philadelphia Derrick & Salvage Corporation for raising the float and in this bill this Defendant was charged for the services of a diver.

16. Further answering the Sixteenth Interrogatory, this Defendant says that the float is in constant use at the port of Philadelphia and, therefore, it is impossible to say just where she will be at a particular time. But if the attorney for the Plaintiff will communicate with the attorney for the Defendant, a time and place for the examination and inspection of the float will be arranged. If plaintiff should desire to communicate direct with the railroad company in respect to a time and place for an inspection, he may do so by calling Rittenhouse 4500, Extension 37 A which is the telephone number of the barge office on Pier 68.

This Defendant says that at no time were any devices or means used to provide buoyancy for the car float.

ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY TO SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF.

(1a) Answering the Supplemental Interrogatory known as (1a) this Defendant says that no surveys, exami-

nations or inspections were made of the float before the towing operation was begun from Pier 12, but after the float had arrived at the Quigley Shipyard Inc. the customary survey was held.

(2a) Answering the Supplemental Interrogatory known as (2a) this Defendant says that written reports or memoranda were made.

(3a) Answering Supplemental Interrogatory known as (3a) this Defendant says:

(a) To this Defendant's knowledge or information the only examination, inspection or survey of the float was made on February 25, 1943 while she was on the railway at Quigley Shipyard Inc. This was a customary survey and the surveyors who attended part in it were:

John G. Howard,
c/o Baltimore and Ohio Railroad Company,
Pier 62 South,
Philadelphia, Pa.

George S. Bugg,
c/o Quigley Shipyard Inc.,
Coopers Point,
Camden, New Jersey

O. C. Chapman,
328 Chestnut Street,
Philadelphia, Pa.

J. H. Murray,
c/o Baltimore and Ohio Railroad Company,
25 Broadway,
New York, N. Y.

(b) No, except that Quigley Shipyard Inc. performed the work as outlined in the survey report and that bill was more or less itemized.

(c) (1) Bill of Quigley Shipyard Inc. referred to above.

(2) The address of Quigley Shipyard Inc. is Coopers Point, Camden, New Jersey.

(3) Mr. P. C. Garrett, General Claim Agent, Baltimore and Ohio Railroad Building, Baltimore, Maryland, and Mr. J. H. Murray, Superintendent Floating Equipment, 25 Broadway, New York, New York. Copies may be found from time to time in other departments of the railroad company at its main building in Baltimore.

(4) The Survey report above referred to was dated February 25, 1943. The bill rendered by Quigley Shipyard Inc. was dated February 22, 1943. A bill was rendered by Philadelphia Derrick & Salvage Corporation February 25, 1943, and a bill was rendered by Taylor & Anderson Towing & Lighterage Company, the same being dated February 26, 1943. On March 6, 1943, Mr. J. H. Murray made a written report to Mr. J. W. Van Horn and Mr. F. G. Hoskins of the railroad company. And on March 25, 1943, Mr. B. F. Levy, Division Accountant, made a report in respect to the expense involved which he supplemented on July 2, 1943. These surveys, reports, etc., were naturally made to determine what, if anything, was wrong with the float, what repairs, if any, were necessary, the cost involved and the necessary bookkeeping entries to be made by the railroad company.

(5) This case was handled in the same manner as similar cases have been handled in the past.

(6) Refer to 5 above.

HOWARD BURTT,
Attorney for The Baltimore and Ohio Railroad Company.

P. J. HENRY,
Division Claim Agent.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss:*

P. J. HENRY, being duly sworn according to law, deposes and says that he is Division Claim Agent for The Baltimore and Ohio Railroad Company, one of the defendants above named, and that the foregoing answers to Interrogatories are true and correct to the best of his knowledge, information and belief.

P. J. HENRY.

Sworn to and subscribed before me the 14th day of February, 1945.

ETHEL S. SMITH,
(Seal) *Notary Public.*
My Commission Expires February 3, 1949.

ORDER.

(Filed February 26, 1945.)

AND NOW, to wit, this 15th day of January, 1945, upon Motion of Messrs. Freedman and Goldstein, counsel for the plaintiff in the within matter, and after due notice to all the parties, it is hereby Ordered, Adjudged and Decreed as follows:

With Respect to the Defendant, Taylor & Anderson Towing & Lighterage Co.

(1) Defendant is required to answer fully the 7th interrogatory propounded by plaintiff.

(2) Defendant is required to state the name and capacity of the person representing this defendant in making the arrangements with the other defendant for the towing of the car float as required in the plaintiff's 8th, 9th and 10th interrogatories.

(3) Defendant is required to answer the plaintiff's 30th interrogatory.

(4) Leave is granted to plaintiff to file supplemental interrogatories as to this defendant.

With Respect to the Defendant, B. & O. Railroad Co.

(5) This defendant is required to specifically answer the 4th interrogatory and state whether the car float required any repairs before it was towed across the river, the nature of any such repairs and what arrangements were entered into for effecting such repairs.

(6) This defendant is required to answer the 13th interrogatory specifically whether it ordered or authorized the Tug "J. M. Taylor" to stand by the car float after it was stuck in the river; whether this defendant at any time agreed to pay for the services of the tug in standing by as set forth in the 12th answer to plaintiff's interrogatories; state what reply J. H. Murray made to the following statement of Captain Anderson set forth in the 12th answer to plaintiff's interrogatories as follows: "Captain Anderson told Mr. J. H. Murray that in his opinion it was safe to have a tug stand by the sunken float to warn navigation, and Captain Anderson also told Mr. J. H. Murray that he thought it better to have a tug stand by than to arrange to anchor and buoy the float." Whether J. H. Murray agreed with Captain Anderson that it was safe to have a tug stand by the sunken float and whether he agreed that it was better to have a tug stand by than to arrange to anchor and buoy the float.

(7) This defendant is required to state all knowledge or information, "definite" or "indefinite" concerning the use of a diver in the matter of raising the float as referred to in the 15th interrogatory.

(8) This defendant is required to state where the float may be inspected and examined as required by the 16th interrogatory.

(9) This defendant is required to deseribe and explain in detail the particular devices and means used to provide buoyancy for the car float; and whether any additional devices were actually used to provide buoyancy.

(10) Leave is granted to plaintiff to file supplemental interrogatories as to this defendant.

/s/ KIRKPATRICK,
U. S. District Judge.

MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 34.

(Filed February 27, 1945.)

Plaintiff, by his counsel, Messrs. Freedman and Goldstein, moves Your Honorable Court for an Order requiring defendant, B. & O. Railroad Company, to produce and permit plaintiff to inspect and copy each of the following documents:

(1) The bills, memorandum and report of the Philadelphia Derrick & Salvage Corporation in connection with the raising and working on the float involved herein;

(2) The bills, statements and reports of John G. Howard, George S. Bugg, O. C. Chapman, J. H. Murray in connection with the matters involved herein;

(3) The survey reports of the float;

(4) Bill of Quigley Shipyard, Inc.;

(5) Bill rendered by Taylor & Anderson;

(6) Report of J. H. Murray to Mr. J. W. Van Horn and F. G. Hoskins, B. F. Levy.

Defendant, B. & O. Railroad Company, has the possession, custody and control of each of the foregoing docu-

ments. Each of them constitutes or contains evidence relevant and material to a matter involved in this action.

FREEDMAN AND GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN.

ORDER.

AND Now, to wit, this 27th day of February, 1945, upon Motion of Messrs. Freedman and Goldstein, counsel for the within plaintiff, it is Ordered, Adjudged and Decreed that the defendant, Baltimore & Ohio Railroad Company, do produce and permit plaintiff to inspect and copy each of the following documents:

(1) The bills of the Philadelphia Derrick & Salvage Corporation in connection with the raising and working on the float involved herein;

(3) The survey reports of the float;

(4) Bill of Quigley Shipyard, Inc.;

(5) Bill rendered by Taylor & Anderson;

(6) Report of J. H. Murray to Mr. J. W. Van Horn and F. G. Hoskins, B. F. Levy,

/s/ KIRKPATRICK,

U. S. District Judge.

DEPOSITION OF S. B. FORTENBAUGH, JR.

(Filed September 19, 1945.)

Deposition of S. B. FORTENBAUGH, JR., ESQ., taken in the Chambers of the Honorable William H. Kirkpatrick, Judge, United States Court House, 9th and Chestnut Streets, Philadelphia, Pa., on April 5, 1945, at 2:50 o'clock.

Present: HON. WILLIAM H. KIRKPATRICK, J.
ABRAHAM E. FREEDMAN, ESQ.
S. B. FORTENBAUGH, JR., ESQ.

This deposition is taken in connection with the 38th interrogatory originally filed by Abraham E. Freedman, Esq., the said interrogatory reading as follows:

> "State whether any statements of the members of the crews of the tugs 'J. M. Taylor' and 'Philadelphia', or of any other vessel, were taken in connection with the towing of the car float and the sinking of the tug 'J. M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statement or reports."

It is agreed that this deposition shall supplement the statement of Mr. Fortenbaugh filed April 5, 1945, and that the two together shall be considered as a part of the record in the above entitled cause, upon which the Court may make a ruling on Mr. Freedman's interrogatories and request for production of documents filed in this matter.

S. B. FORTENBAUGH, JR., ESQ., was examined and testified as follows:

DIRECT EXAMINATION,

By THE COURT:

Q. Now, Mr. Fortenbaugh, you represented Taylor and Anderson on a general retainer on or about February 10, 1943; you were their general counsel?

A. Not on a retainer basis, but I have represented Taylor and Anderson for a great many years.

Q. In other words, you considered them clients of yours?

A. That is correct.

Q. You didn't have an annual retainer from them?

A. That is correct.

Q. Did you attend the United States Steamboat Inspector's investigation to which you refer in your statement of March 4, 1943?

A. I did not personally attend it, but somebody from my office did.

Q. Had suits been brought by any of the four of the five deceased local representatives with whom you settled?

A. With one exception, they were all represented by counsel who made demand on Taylor and Anderson, but I do not believe that any suit was actually started—there may have been one.

Q. Can you give me any idea as to the dates when settlements were made in these cases? It is not mentioned in your statement.

A. I will be glad to take from my files the exact dates when we obtained the releases, but I believe the first one was made approximately four months after the accident, and the others were made at intervals of a couple months thereafter.

Q. Had all of the settlements been made by November 26, when Mr. Freedman commenced this present action, as well as you can remember?

A. With one possible exception, and that exception was settled either just before or just after Mr. Freedman's action.

Q. Now, am I to understand from what you told me, just before this deposition was taken, that Taylor and Anderson is a comparatively small concern, is that right?

A. Yes, sir.

Q. And how many tugs do they own?

A. They own and operate seven tugs. As far as the port of Philadelphia is concerned, they have about as large a volume of business as any towing concern.

Q. I also understand they did not have any regular claims department of their own.

A. That is correct.

Q. They have no officer or employee who corresponds in any way with a claim agent of a large corporation?

A. That is correct. The form of organization is that of a partnership consisting of John M. Taylor and George H. Anderson, and their entire office force consists of a dispatcher and possibly two on the clerical staff.

Q. All the other employees are actually operating seamen or masters of tugs, or men of that kind?

A. That is correct. I presume there is some fluctuation in the number in the office, but generally it is small.

Q. They do not employ any investigator?

A. That is correct.

Q. You have referred in your statement to the fact that you interviewed all four surviving members of the crew and took their statements. Can you tell me about when these interviews took place and the statements were taken? Were they taken immediately after the accident?

A. They were taken very shortly after the accident. The survivors were in the hospital for various times, as I recall it, and I believe the statements were taken directly after the steamboat inspector's hearing, and that, as is very usual in these cases, they were not signed for until some

time thereafter, because of the inability to locate them. I can, of course, ascertain from my file exactly those dates.

Q. Perhaps we might have you add these later on. Can you also ascertain from your files the dates when demands were made by any of the representatives of the survivors? In other words, what I would like to get at, although I say now I don't consider it a conclusive factor in the case, but I would like to know whether the statements were taken by you before claim had been made, actually presented, in behalf of any of the deceased seamen.

A. One of the deceased seamen was represented at the steamboat inspector's hearing. My recollection is, the statements were taken after that date; they were taken, undoubtedly, before Mr. Freedman's demand.

Q. Oh, yes; I would just like to know how they fit in with the other three.

A. I will be very glad to give you a schedule when the claims were filed.

Q. And when the statements were taken?

A. Yes.

Q. I would be very glad to have ~~that; I think~~ that would help.

Also, while you do not say so in your statement, I understand from what you told me that you interviewed a number of persons other than the actual survivors of the crew.

A. That is correct.

Q. And they made oral statements to you, which were, in some way, in your judgment, relative to the issues in this case?

A. I, and others in my office, did interview a number of people with the idea of developing the cause of the accident in question.

Q. By the way, did you make a memorandum of the interviews? I understand from what you said you didn't take any other written statement, signed statements?

A. I believe that is the case. I did not take any signed statements—I certainly took memoranda.

Q. So that you could, probably, by looking at the files, give me an idea of the dates or the period of time during which you were taking these statements? If you can, I would be glad to have you do that.

A. As is usual, most of the examination and investigation took place immediately afterward, but it was a continuous attempt to develop any theory as to how this car float sank and how it rose.

Q. Then, as I understand it, you have a number of memoranda of interviews with witnesses or persons having a knowledge of the facts, which were taken about the same time you took the written statements of the survivors?

A. This case involved the sinking of a car float and its recurrent arising in the Delaware River; it is an extraordinary accident, and it has been the subject of a great deal of speculation in this port and in New York, and as recently as last Monday I was discussing the question of a car float performing in the fashion that it did. I have talked with a dozen people in that respect.

When we talk about memoranda, I doubt very much if I have anything of substance in writing, because of the fact that nobody has ever been able to explain to me, or to anyone else concerned in this case, how it happened; that is, exactly; we talk and we talk, but we never get anywhere in this case.

For example, at one time when the tug was on the railway I went aboard her myself with certain friends to see the damage.

I do not suppose that there is in my file any written memoranda, but I remember very definitely the circumstances and who the individuals were.

Q. That would be relevant, and you could call them as witnesses?

A. That is correct.

Q. Well, now, this procedure of your taking statements of witnesses, written and oral, immediately after the accident, is that a procedure which has been followed in every case of other accidents with this particular client? Have you done that in any other case?

A. It has been followed not only with these clients but in all Admiralty cases that are referred by underwriters to defend any legal liability which may arise.

Q. These statements are undoubtedly taken in most cases and the investigation is made before actual claims have been made, or suits begun?

A. I would say, generally, it is; of course, there are incidents where it is not expected there will be any litigation, and it is not referred until after litigation is started.

Q. Let me ask you this: this matter was referred to you, as I understand, by the underwriters? You state in your statement that you were "formally requested to defend whatever litigation"—was that from Taylor & Anderson or from the underwriters?

A. I would better say from both.

Q. From both?

A. I say that because there is in the owners an interest which may or may not be covered by the policy, and there is always that question.

Q. I presume that the underwriters maintain their own claims department, investigators, and so forth?

A. Oh, yes, they do.

Q. They did not participate in this investigation or preliminary taking of statements in any way, is that correct? At least, you haven't mentioned it.

A. They certainly took no statement. I don't want to say they didn't participate—they certainly were silent partners if they did anything, they were the ones who originally called me and said that they had policies outstanding under which there might be liability, and would the office conduct the investigation.

Q. That is, your office?

A. That is correct.

Q. Did they send somebody to help you in doing that?

A. No.

Q. No?

A. No.

Q. There may have been some of their representatives present at some time during your investigation?

A. I would seem to recall, when I talked with the survivors, there was a representative of the underwriters present, but he didn't take statements and did not participate actively.

Q. Mr. Fortenbaugh, did Taylor & Anderson have any claims against anybody to recover damages for the loss of the tug, or did they refer to you the question of whether they did have any such claim against any other party?

A. Concurrently with the defense of any possible claims against Taylor & Anderson, we investigated and collaborated on the possibility of Taylor & Anderson having a right of recovery against the Baltimore & Ohio Railroad, and it might very well also have been that our report was a factor in the settlement between Taylor & Anderson and the underwriters.

Q. That was part of your employment when this whole matter was referred to you jointly, as you said?

A. I would not draw a distinction between Taylor & Anderson and the underwriters—we were acting for both as their interests might appear.

Q. Of course, the underwriters were not interested in Taylor and Anderson's recovery against the Baltimore & Ohio?

A. They might have been subrogated because of coverage under the hull policy.

Q. Anyway, that was a part of your subject of investigation under which these statements were taken?

A. That is correct, and we reported to the underwriters that we saw no cause of action against the Baltimore & Ohio Railroad.

THE WITNESS: After communicating with my office, I submit the following supplemental data:

No litigation was actually started outside of the within action.

The widow of Captain Murray was in direct communication with me almost immediately after the accident, but finally appeared by counsel by letter dated March 19, 1943, and the case was settled on July 8, 1943.

In the matter of Dixon, letter from counsel was received on February 26, 1943, and settlement was made on September 26, 1944.

The Fidelity-Philadelphia Trust Company appeared on behalf of a relative of Andrew Benekos, but subsequently his claim was withdrawn.

There was apparently no appearance by counsel for the heirs of Ole Knudsen.

The statements of the survivors were signed on March 29, 1943.

Reported by

H. A. B. SCHWARTZ.

OPINION

Sur Exceptions to Interrogatories.

Before KIRKPATRICK, WELSH, KALODNER, BARD and GANEY, *District Judges.*

By KIRKPATRICK, *District Judge.*

The plaintiff's husband was one of five seamen who were drowned when the Tug "J. M. Taylor," capsized, on February 6, 1943. On November 26, 1943 she began this suit under the Jones Act to recover damages for his death, and thereafter filed 39 interrogatories, of which No. 38 is as follows:

"State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

The defendants Taylor & Anderson excepted to this interrogatory as "calling for privileged matter obtained in preparation for litigation."

Supplemental interrogatories, including a request for the production of "memoranda," and intended to elicit further information about the statements, were also excepted to. Mr. Fortenbaugh, counsel for the defendants, Taylor & Anderson, then filed a written statement and later testified by deposition, fully disclosing how and for what purposes the statements were obtained, which statement of counsel and testimony were, by stipulation, made part of the record, as a fact basis for the Court's ruling upon the question raised by the exceptions.

The question is whether a party, under the circumstances of this case, should be required to produce written statements of certain witnesses and memoranda of oral statements of others, and to disclose the substance of cer-

tain oral statements, all statements having been made to the party's attorney. The defendant has made no point of the plaintiff's procedure by interrogatories under Rule 33, and the propriety of the practice will therefore be assumed without deciding that question. The plaintiff might have elected to take depositions or, in the case of written statements and memoranda, to file a motion to produce under Rule 34. What is said in this opinion applies to all three forms of discovery.

The circumstances under which the statements were taken are as follows:

Taylor & Anderson is a partnership, operating seven tugs in and about the Port of Philadelphia. The partners were clients of Mr. Fortenbaugh's firm, which had been regularly representing them for a number of years though not upon any salary or general retainer basis. Taylor & Anderson had no claims department and no employees regularly charged with the duty of making investigations of any kind, their entire office force consisting of not more than three persons.

Four days after the accident both Taylor & Anderson and their insurance carriers got in touch with Mr. Fortenbaugh and requested him to "defend whatever litigation arose from the sinking in behalf of both the owners of the tug and the underwriters." Acting under this general instruction, Mr. Fortenbaugh interviewed the four surviving members of the crew, all employees of Taylor & Anderson, and took their written statements. Apparently these statements were taken immediately after a steamboat inspector's hearing on March 4 at which the witnesses had appeared and testified. The statements were signed on March 29. Subsequently he interviewed other persons believed to have some knowledge of various matters relating to the accident and in some cases made memoranda of what they told him.

At the time the written statements were taken the widow of one of the deceased seamen had been in direct

communication with Mr. Fortenbaugh and the widow of another had employed counsel who had written him a letter. No representatives of the other three, including the plaintiff, had appeared or been in communication with the defendants. Thereafter settlements were effected with the representatives of three of the deceased seamen. No claim has ever been made by any representative of the fourth. The plaintiff brought this suit some eight months after the witnesses' statements had been obtained.

Discovery of the contents of statements made by witnesses to a party investigating an accident which may involve legal liability is a matter as to which the Rules give the trial court the widest discretion. It is, of course, proper and desirable that the Court should let parties and their counsel know what considerations are deemed material in exercising the discretion so given, but to convert such general statements into rigid limitations would result in creating opportunities for evasion and destroy flexibility, which is a vital feature of federal discovery procedure. The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process. The only limitation which can properly be placed upon the scope of such discovery is, as stated in National Bondholders Corporation v. McClintic, 99 Fed. (2d) 595, 599, "with regard to the taking of depositions for discovery or otherwise, a discretion is vested in the district judge to measurably control the otherwise freedom of the taking of depositions where 'for good cause shown' it will not, in the opinion of the district judge, promote the administration of justice in the particular case that they be taken."

In Stark v. American Dredging Co., 3 F. R. D. 300, cited and relied on by the defendants, this Court denied a motion to order the production of statements of witnesses taken in preparation for trial. We do not regard that decision as laying down a hard and fast rule that state-

ments obtained for that purpose are privileged, or exempt from production for any other reason. The Court said, "The limitation remains subject to the general liberal spirit of the rules; and 'the amount of protection properly required against an undue invasion of privacy will rest largely on the discretion of the court.'" Insofar as the next sentence of the opinion, which reads "A request to produce statements of witnesses taken by the other party in preparation for trial 'should be predicated upon good cause shown'", may be taken to cast upon the party seeking production of such statements the burden of showing exceptional or unusual circumstances, it is disapproved and the rule may be restated "Unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."

In the Stark case, supra, the Court, we think, made it clear that the mere fact that the statements bear upon the possible legal liability of a party does not render them unreachable when litigation ensues, and we may amplify by saying that even the fact that the chief purpose of taking them was to prepare for litigation does not do so. In the present case, however, it should be pointed out that there were compelling reasons for taking the statements of the survivors, entirely unconnected with any anticipated suits for damages. One of the defendants' vessels had capsized and sunk in an accident of so unusual a nature as to be almost unique. Five lives had been lost. Even had there been no thought of possible liability, we doubt that any firm or owners would have failed to make a thorough investigation to determine the cause of the disaster and in so doing to take statements of witnesses. Not only was it important to them to ascertain whether their vessel was in all respects seaworthy and whether any of their employees were in any way responsible for what happened, but general safety considerations and a due regard for their obligations to the public, as well as their own interest, in view of the possi-

bility of unfounded or unfair criticism, demanded that the cause of the sinking be fully explored.

We think it proper to order the production of the written statements.

The same considerations apply to the facts learned by the defendant and coming to it in the form of oral statements of witnesses obtained by the attorney in the course of investigation. So far as these statements contain matters of fact, as distinguished from opinion, material to the issues involved they should be disclosed.

What has been said has to do with the Court's discretion. The question of privileged communications between attorney and client is another matter and is governed by rules of law. Of course, the Court may not, in exercising its discretion, transgress those rules. However, the mere fact that statements of third parties have been taken by an attorney does not of itself give rise to the privilege. In such case the lawyer is merely the medium through which his client becomes apprised of facts and his intention to transmit them to his client does not make the facts priviliged from disclosure in answer to interrogatories. We think that none of the statements made by witnesses in the present case are protected by any rule relating to privileged communications between attorney and client.

Insofar as the memoranda made by counsel consist of mere statements of fact made to him by witnesses they are in all respects equivalent to unsigned statements by the witnesses and are in no different category than the signed statements. In taking down what various witnesses told him about the case Mr. Fortenbaugh was acting primarily as an investigator. The liberal scope of discovery under the Rules displaces any concept of proprietary or quasi-proprietary interest which, under the prior practice, a party to a suit may have claimed in the fruits of his investigation. Of course, it may appear that the memoranda contain, in addition to facts, various matters which the plaintiff has no interest in or right to know. Discovery

should not be abused to become an instrument for obtaining knowledge of the opponent's theories of the case or the opinions, impressions or the record of mental operations of his attorney. As was suggested in the Stark case, supra, freedom in preparation for trial of a disputed issue under our judicial system contributes to satisfactory results, and there cannot be such freedom without some assurance of privacy within reasonable limits. If Mr. Fortenbaugh's record of the oral statements made to him by witnesses also contain notations of mental impressions, opinions, legal theories or other collateral matter these memoranda should be submitted by him to the Court. The Court will then direct disclosure to the opposite party of those portions of the memoranda containing statements of fact obtained from witnesses which it considers to be within the proper scope of discovery.

Defendant is directed to answer the 38th interrogatory, to produce the witnesses' written statements referred to in Mr. Fortenbaugh's statements to the Court, to state, in substance, any fact concerning this case which it learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda, and to produce Mr. Fortenbaugh's memoranda containing statements of facts by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to the opposing party.

ORDER.

(Filed September 5, 1945.)

And Now, to wit, this 5th day of September, 1945, this case having come before the Court upon Defendant's exceptions to the 38th interrogatory and supplementary interrogatories propounded by Plaintiff, argument having been had before the Court en banc, and the Court having filed its written opinion requiring Defendants to answer Plaintiff's interrogatory and to produce certain statements

and documents in connection therewith under Rules 33 and 34 of Civil Procedure for the District Courts of the United States, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, shall forthwith, answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.

/s/ KIRKPATRICK,
U. S. D. J.

We hereby respectfully decline to obey the Order of the Court dated the 5th day of September, 1945.

JOHN M. TAYLOR,
Defendant.

GEORGE H. ANDERSON,
Defendant.

SAMUEL B. FORTENBAUGH, JR.,
Counsel and Agent for John M. Taylor and George H. Anderson, Individually and Trading as Taylor & Anderson Towing & Lighterage Company.

Dated: September 5th, 1945.

STATEMENT OF S. B. FORTENBAUGH, JR., ESQ.

(Filed September 20, 1945.)

S. B. Fortenbaugh, Jr., Esq., a member of this Court and of the firm of Shields, Clark, Brown & McCown, counsel for the Defendant, Taylor & Anderson Towing & Lighterage Company, makes the following statement for the record in the matter of Plaintiff's motion to hold Taylor & Anderson Towing & Lighterage Company in contempt for failure to answer Interrogatories:

On February 7, 1943, the Tug "J. M. Taylor" sank in the Delaware River with the loss of the lives of the following five members of the crew:

Alton Murray	Captain
Andrew Benekos	Fireman
Ole Knudsen	Deckhand
Alfonso Dixon	Cook
Norman Hickman	Fireman

The four survivors of the accident were:

Philip West	First Mate
Russell Savage	Deckhand
Charles Long	First Engineer
Walter Quillen	Assistant Engineer

On February 10, 1943, relator was formally requested to defend whatever litigation arose out of the sinking, on behalf of the owners of the Tug "Taylor" and the underwriters covering the said tug, all of whom had regularly been represented by the same attorneys in the past.

On March 4, 1943, an investigation was convened by the United States Steamboat Inspectors in the Custom House, testimony was taken of the four survivors aforesaid and Captain John M. Taylor, one of the owners of the Tug "J. M. Taylor." The examination was conducted publicly by a governmental examining officer and all known counsel and interested parties were invited to be present.

(Settlement has been made in various nominal amounts with all of the four survivors and with four out of the five of the deceased's legal representatives. The sole exception is the claim presented for the death of Norman E. Hickman as stated in the within litigation.)

On April 2, 1943, Louis F. McCabe, Esq., advised Defendant, Taylor & Anderson Towing & Lighterage Company, of his representation of George E. Hickman, father of Norman E. Hickman. Counsel communicated with Mr. McCabe, denying liability but expressing a willingness to confer after completion of investigation.

On November 26, 1943, the within action was commenced and citation issued, the Plaintiff then appearing by Freedman & Goldstein, Esqs.

Coincident with and continuously after February 10, 1943, counsel for Taylor & Anderson Towing & Lighterage Company have conferred, corresponded and negotiated with numerous counsel, as necessary in the defense of all manner of claims presented as the result of this accident. In the course of preparing for possible defense of these claims, including the within action, counsel for Taylor & Anderson Towing & Lighterage Company, have interviewed the four surviving members of the crew of the Tug "Taylor" and taken their statements. Counsel have also attended the survey of the tug, copy of which has been submitted to the Plaintiff. Counsel have conferred with a number of parties who have personal knowledge of the circumstances of the sinking and with general marine experts.

On November 27, 1944, one year after the institution of suit, thirty-nine interrogatories with numerous subdivisions were propounded by the Plaintiff to the Defendant. These have been answered in detail. On January 15, 1945, further interrogatories were propounded by the Plaintiff to the Defendant, including supplemental interrogatory 3 (a), requesting detailed information as to the investigations and records of the Defendant, Taylor &

Anderson Towing & Lighterage Company, particularly as the same relates to the investigation and defense of this case by this relator. Supplemental interrogatory 3 (a) has been answered to the effect that there are no records or investigations except as made by counsel as aforesaid, for his own use and in preparation for examining his witnesses at the trial, it being averred inter alia as follows:

> "Any and all statements taken were in the course of preparation by counsel for possible litigation. Defendants, Taylor & Anderson Towing & Lighterage Company, except to Interrogatory 3 (a) in that it requires the disclosure of entirely irrelevant, immaterial and inadmissible information in an attempt to obtain indirectly counsel's private files. The answering of the very minute and detailed interrogatory would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

/s/ S. B. Fortenbaugh, Jr.
4/5/45

ORDER FOR CRIMINAL CONTEMPT.

(Filed September 5, 1945.)

AND Now, to wit, this 5th day of September, 1945, it appearing to the Court that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, have neglected and refused, and continue to neglect and to refuse to obey the Order of this Court dated the 5th day of September, 1945, ordering them to answer the 38th interrogatory and supplementary interrogatories propounded by the Plaintiff in this case and to produce certain statements and documents in connection therewith under Rules 33 and 34 of the Rules of Civil Procedure,

Now, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is

ORDERED, ADJUDGED AND DECREED that John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., are in contempt of the Court, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshal for the Eastern District of Pennsylvania forthwith take John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., into his custody and commit them to the Philadelphia County Prison until such time as each of them purges himself of his contempt or until further order of the Court.

/s/ KIRKPATRICK,
U. S. D. J.

NOTICE OF APPEAL.

(Filed September 5, 1945.)

Notice is hereby given that John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., hereby appeal to the United States Circuit Court of Appeals for the Third Circuit from the sentence imposed upon them by the Court the 5th day of September, 1945 from the Order adjudging them to be in contempt of the Court dated the 5th day of September, 1945 and from the Order requiring them to answer certain interrogatories and to produce certain documents and statements in connection therewith under Rules 33 and 34 of the Rules of Civil Procedure for the District Courts of the United States.

JOHN M. TAYLOR, GEORGE H. ANDERSON,
and SAMUEL B. FORTENBAUGH, JR.,

By SAMUEL B. FORTENBAUGH, JR.

ORDER FOR SUPERSEDEAS IN RE CONTEMPT ORDER AGAINST JOHN H. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.

(Filed September 5, 1945.)

WHEREAS, this Court entered an Order on the 5th day of September, 1945, adjudging John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., in contempt for failure to comply with the Order of this Court, dated the 5th day of September, 1945, requiring the production of certain statements and the disclosure of certain information; and

WHEREAS, the Order committed John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., to the Philadelphia County Prison until such time as each of them shall purge himself of his contempt; and

WHEREAS, John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., have, on the 5th day of September, 1945, filed a Notice of Appeal from the sentence, the Order adjudging them to be in contempt of the Court and the Order requiring them to answer certain interrogatories and to produce certain statements and documents, and

WHEREAS, John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., desire to stay all proceedings in the above entitled cause until the termination of the Appeal;

NOW, THEREFORE, it is further ORDERED that execution upon the said Order of Contempt shall be stayed pending disposition of the Appeal in the United States Circuit Court of Appeals and all proceedings meanwhile to stay.

/s/ KIRKPATRICK,
U. S. D. J.

STIPULATION OF RECORD ON APPEAL.

(Filed September 20, 1945.)

And Now, to wit, this 18th day of September, 1945, it is Stipulated and Agreed by and between Freedman, Landy and Lorry, attorneys for Plaintiff, and Guckes, Shrader and Burtt, attorneys for Defendant, B. & O. Railroad Co., and Shields, Clark, Brown & McCown, attorneys for Defendant, Taylor & Anderson Towing & Lighterage Co., that one copy of each of the following shall constitute the record on appeal:

Complaint.

Answer of B. & O. R. R. Co.

Answer of Taylor & Anderson Towing & Lighterage Co.

Plaintiff's interrogatories to defendants, John M. Taylor, et al.

Plaintiff's interrogatories to defendant, B. & O. R. R. Co.

Answers of Baltimore & Ohio R. R. Co. to interrogatories.

Supplemental interrogatories propounded by plaintiff to defendants, Taylor & Anderson Towing & Lighterage Co.

Supplemental interrogatories propounded by plaintiff to defendant, B. & O. R. R. Co.

Answers of Taylor & Anderson Towing & Lighterage Co. to plaintiff's interrogatories.

Answers of Taylor & Anderson to plaintiff's original and supplemental interrogatories.

Further answers of Baltimore & Ohio R. R. Co. to interrogatories and answers to supplemental interrogatories.

Order of Court dated Jan. 15, 1945.

Motion by plaintiff for production of documents and Order of Court granting motion in part.

Opinion of the Court, by Kirkpatrick, J., Requiring defendant to answer certain interrogatories and to produce documents.

Order of Court requiring defendants and their counsel to answer certain interrogatories.

Refusal of defendants and Counsel to answer certain interrogatories.

Order of Court adjudging defendants, John M. Taylor and George H. Anderson and their counsel, Samuel B. Fortenbaugh, Jr., to be in contempt of court and committing them to prison.

Notice of appeal.

Order of Court granting supersedeas re: contempt order.

Statement of S. B. Fortenbaugh, Jr., Esq.

Testimony of S. B. Fortenbaugh, Jr., Esq.

FREEDMAN, LANDY AND LORRY,
By /s/ ABRAHAM E. FREEDMAN,

GUCKES, SHRADER AND BURTT,
By /s/ HOWARD BURTT,

SHIELDS, CLARK, BROWN & MCCOWN,
By /s/ S. B. FORTENBAUGH, JR.

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

vs.

JOH. M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing & Lighterage Co. and B. & O. Railroad Co.

JOHN M. TAYLOR, GEORGE H. ANDERSON, and SAMUEL B. FORTENBAUGH, JR., Appellants

PETITION FOR LEAVE TO APPEAR AS AMICUS CURIAE—Filed September 24, 1945

The Petition of Krusen, Evans and Shaw respectfully prays this Honorable Court that leave be granted to appear in the above entitled matter as Amicus Curiae and to submit a Brief and present oral argument to the Court upon the hearing of the cause before this Court.

The reason therefore are as follows:

1. The question to be determined in the case involves the interpretation of the Federal Rules of Civil Procedure.

2. The question is of great importance to all members of the Bar practicing before the Federal Courts.

3. Your Petitioners practice before the United States District Court for the Eastern District of Pennsylvania, and are vitally interested in the outcome of the case to be heard before this Court. The also represent clients who have an [fol. 78] equal interest in the proceedings before this Court.

4. Your Petitioners have communicated with Abraham E. Freedman, Esquire, and Samuel B. Fortenbaugh, Jr., Esquire, counsel for the respective parties in the case, and are authorized to state to the Court that neither counsel has any objection to the filing of this Petition and the granting of the same by this Court.

Wherefore, your Petitioners respectfully pray that the Court enter an order granting Petitioners leave to appear

as Amicus Curiae and to submit a Brief and to argue orally before the Court when the case is listed for argument.

Respectfully submitted, Krusen, Evans and Shaw, by —— ——.

[File endorsement omitted.]

[fol. 79] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ALLOWING KRUSEN, EVANS & SHAW TO APPEAR AS AMICUS CURIAE—Filed September 26, 1945

It is hereby ordered and decreed this 26th day of September, 1945, that the Petition of Krusen, Evans & Shaw for leave to appear as Amicus Curiae in the above entitled matter is granted in accordance with the prayer of the Petitioners.

By the Court, Goodrich, C. J.

[fol. 80] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE—Filed September 27, 1945

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of Joseph W. Henderson respectfully shows to your Honorable Court as follows:

1. Your petitioner is a member of the bar of your Honorable Court and of the bar of the District Court for the Eastern District of Pennsylvania.

2. The decision of the learned District Court Judges in the above-entitled case is of great importance to your petitioner as a member of the bar of the District Court, and to

such clients as may be involved in litigation before the bar of that Court, now and in the future.

3. The decision involves an interpretation of Rules 26, 33 and 34 of the Rules of Civil Procedure in the District [fol. 81] Court.

Wherefore, your petitioner respectfully asks your Honorable Court to grant leave to file a brief in the aforesaid appeal, as amicus curiae.

(S.) Joseph W. Henderson, Petitioner.

[File endorsement omitted.]

[fol. 82] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ALLOWING JOSEPH W. HENDERSON TO FILE BRIEF AS AMICUS CURIAE—Filed September 27, 1945

And now, to wit, this 27th day of September, 1945 upon motion of Joseph W. Henderson, Esquire, and upon consideration of the within petition,

It is hereby Ordered, Adjudged and Decreed that the petitioner may have leave to file a brief in the above entitled appeal, as amicus curiae.

By the Court. Goodrich, for the U. S. Circuit Ct. of Appeals for the Third Circuit.

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ASSIGNING HON. ALBERT LEE STEPHENS FOR ARGUMENT —Filed October 1, 1945

And now, to-wit: this 1st day of October A. D. 1945, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

[fol. 84] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY OF ARGUMENT

And afterwards, to wit, the 1st day of October, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Albert Lee Stephens and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title Omitted]

ORDER DIRECTING REARGUMENT

It is ordered that on November 10, 1945 there will be a reargument in the above entitled case before the Court en banc.

Goodrich, J.

October 12, 1945.

[fol. 86] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY OF REARGUMENT

And afterwards, to wit, 10th day of November, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert Lee Stephens, Honorable Albert B. Maris, Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of December, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 87] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, and Baltimore & Ohio Railroad Co.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR., Appellants

Appeal From the Order of the United States District Court for the Eastern District of Pennsylvania

Argued October 1, 1945. Reargued November 10, 1945

Before Biggs, Albert Lee Stephens, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed December 10, 1945

[fol. 88] By GOODRICH, Circuit Judge.

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania, which adjudged the appellants guilty of criminal contempt and imposed sentence therefor. The appellants are two clients and their lawyer. The basis of the contempt order was their refusal to answer a certain interrogatory propounded by the plaintiff's counsel in a personal injury suit. They took the position that what was asked for was beyond the proper scope of the discovery process under the Federal Rules. The court ruled against them and upon their disobedience

of the order adjudged them guilty of contempt. We, therefore, have the basis for appeal.[1]

The case tests the limits, if any, of the scope of the discovery procedure under the Federal Rules. A reversal of the judgment for contempt would of necessity compel us to decide that the District Court had gone too far. In considering the question we have the help of the host of District Court decisions upon the relevant paragraphs of the Rules. Some of them will be noted below. It is sufficient here to refer to the complete collection in Federal Rules Service, Chapters 26, 33 and 34. There is little

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[1] Rule 37(b)(1) provides: "Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court." Rule 37(b)(2) provides: "Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done * * * the court may make such orders in regard to the refusal as are just, and among others the following: * * * (iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders * * *." Appellate review of the final judgment of contempt involves power to review the civil element as well as the criminal and to grant relief affecting both. In Apex Hosiery Co. v. Leader et al., 102 F. (2d) 702 (C.C.A. 3, 1939) this Court decided that an order was interlocutory hence not appealable but specifically stated that contempt orders were subject to review and cited Union Tool Co. v. Wilson, 259 U. S. 107 (1922) as general authority for the procedure involved here. Mr. Justice Brandeis at page 111 of the latter opinion said, "The contemnor may obtain immediately a review by writ of error. * * * the Court of Appeals [could] * * * review that part which was civil as well as that which was criminal in its nature. [And grant] * * * relief which affected both * * *."

[fol. 89] appellate authority for the obvious reason that these orders are nearly always interloc-tury, R. D. Goldberg Theater Corp. v. Tri-States Theater Corp., 8 Fed. Rules Serv. 34.64, Case 1 (D.C. D. Neb. 1944) and cases there cited; the question seldom comes before a Circuit Court of Appeals.[2] The instant case had thorough consideration in the District Court. It was heard en banc by all the Judges of the District Court for the Eastern District of Pennsylvania and the thoroughly considered opinion by the Senior Judge was concurred in by all of his colleagues. — F. Supp. — (1945). The opinion in that Court premises that "The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process." Starting from that premise the District Court concluded that the information sought to be elicited was relevant to the suit

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[2] The few appellate cases we have are remote from the central issue here and arose under the following circumstances: In Terminal Railroad Assn. of St. Louis v. Moore, 145 F. (2d) 128 (C.C.A. 8, 1944) while a personal injury action was pending in the Eastern District Court of Missouri a petition for writ of prohibition was filed in the Eighth Circuit Court of Appeals challenging an order of the District Court under Rule 34, giving plaintiff the right to inspect statements he had made to defendant concerning plaintiff's accident or injuries. Writ denied.

Hoffman v. Palmer, 129 F. (2d) 976 (C.C.A. 2, 1942), affirmed 318 U. S. 109 (1943) appeal by defendant from judgment for damages entered after jury trial. Error alleged on exclusion from evidence, of a statement signed by engineer driving the locomotive when the accident occurred. Reversed.

United States v. Smith, 118 F. (2d) 911 (C.C.A. 9, 1941) is even more remote in its collateral applicability. The case arose upon suit on a war risk insurance policy and the court ordered production of a document to refresh the memory of adversary's witness.

National Bondholders Corporation et al. v. McClintic, 99 F. (2d) 595 (C.C.A. 4, 1938) arose on mandamus proceedings against a district judge to vacate an order staying the taking of depositions of certain witnesses. Denied.

and that counsel for the defendants could be compelled to disclose it to the opposing party.

Such facts as are needed for an understanding of the controversy may be very briefly stated. A tug owned by Taylor and Anderson had capsized and five seaman met their deaths in the accident. Action was brought by the administrator of one of them under the Jones Act. Through her counsel she filed thirty-nine interrogatories. The [fol. 90] appellants answered all but one. This one is Number 38 which reads as follows:

> "(38) State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

There were some supplemental interrogatories including a request for the production of memoranda.[3] Mr. Fortenbaugh, the lawyer concerned, filed a written statement and later testified by deposition telling how and why the statements were obtained. So much for background of fact. Was the District Court correct in its law?

The parties are not entirely clear which of the Federal Rules is involved. The appellant says it is 34 or perhaps 33 and 34. The appellee in oral argument stated that he was proceeding under Rule 33. The District Court considered the plaintiff to be proceeding under Rule 33, although it said that the plaintiff could have elected to take depositions or, in case of written statements, have filed a motion to produce under Rule 4. Then the District Court stated that "What is said in this opinion applies to all three forms of discovery."

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[3] They read as follows:

"(1a) State whether you or your representatives have any knowledge or information as to whether any survey, examination or inspection was made of the Tug 'J. M. Taylor,' after it was raised from the Delaware River.

"2(a) State whether you or your representatives have any knowledge or information as to whether any oral or

[fol. 91] We take up this point first before getting to the main question. We think that 33 is the Rule involved and, for reasons which appear later, Rule 26 also. Plaintiff is not seeking to see an original document and copy or photograph it as provided in Rule 34. He is proceeding by interrogatory and, in connection with an interrogatory, wants the defendant to give him a copy of a memorandum. This is, in our opinion, concerned with Rule 33 rather than 34. But since the District Court, as above quoted, proceeded upon the theory that what is said applied to all the discovery Rules we are required to point out a difference in language in these Rules which we think must be given attention.

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written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the towing operation, sinking, salvaging and repair of the said tug and car float, the death of the deceased and any other matter related to the accident and incidents involved herein.

2(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) Whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) If you answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

Rule 34 requires good cause to be shown.[4] The opinion of the District Court states that it amends its statement in Stark v. American Dredging Company, 3 F. R. D. 300 and that the rule be restated "Unless, under the circumstances of any particular case, the court is satisfied that the admin- [fol. 92] istration of justice will be in some way impeded, discovery will be granted when asked." We think this is the proper approach to the exercise of discretion under Rule 33. We do not think that it is correct under the language used in Rule 34. The requirement in Rule 34 for showing of good cause cannot be disregarded. Insofar as the remarks of the learned District Court apply to Rule 34, they went too far. Insofar as they apply to Rule 26 and Rule 33 they are approved. This point does not change the result in the instant case, or relieve us from facing the problem it presents. We pass on it because the District Court passed on it by applying its opinion to all the Rules

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(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different."

[4] As to what precisely is meant by good cause the cases do not indicate with any degree of certainty: Marzo v. Moore-McCormack Lines Inc., 8 Fed. Rules Serv. 34.13, Case 1 (D.C. E.D. N.Y. 1945) Inch, D.J. "No attempt is made to show 'good cause' which means some plainly adequate reason for the desired production and inspection. Plaintiff's

which provide for discovery. We go on then to the difficult question involved in the appeal.

The important matters called for in the interrogatory are statements which the lawyer, acting in an investigating capacity, has taken from persons who have, or purport to have, knowledge about the facts which gave rise to the lawsuit. Two things are asked for. One is a copy of the statements which are in writing, whether signed or not, or merely memoranda; the other is that the lawyer reduce oral statements to writing and give his opponent a copy thereof.

As we approach the question we must discard some favorite craft notions of the advocate. We must discard, for instance, the concept that there is something close to a property right in the information which the lawyer digs up [fol. 93] about the client's case and has in his possession.[5] We must also discard the notion that questions from the

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mere statement that he is entitled to the relief sought is insufficient."; Heiner v. North American Coal Corp., 3 F. R. D. 63 (D.C. W.D. Pa. 1942) Gibson, D.J. "To entitle complainant to the order prayed he must show good cause for the order, must designate the documents desired, and must show that they are not privileged and are material to any matter involved in the action."; Leach v. Grief Bros. Cooperage Corp., 2 F. R. D. 444 (D.C. S.D. Miss. 1942) Mize, D.J. "It is difficult to lay down a definition of good cause that would apply to every particular case. There is a wide latitude." (Affidavit that defendant was preparing to take testimony of the same persons who had given the statements, showed good cause for inspecting the statements); Piorkowski v. Socony Vacuum Oil Co., 4 Fed. Rules Serv. 34.411, Case 1 (D.C. M.D. Pa. 1940) Watson, D.J. A party does not show good cause if he "has failed to show that the documents desired will in any way aid him in the preparation of his case, or that there is reasonable cause for believing that the contents of the documents concern this case."

[5] "Some lawyers also grumble saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data." Hoffman v. Palmer, 129 F. (2d) 976 (C. C. A. 2, 1942), affirmed 318 U. S. 109 (1943).

other side can be fended off on the ground that the opponent's lawer is simply engaged in a fishing expedition." [fol. 94] These notions are hard to get rid of, but we take it that they are contrary to the idea back of this discovery portion of the Federal Rules. The premise taken by the District Court, quoted above, is not dissimilar to that of

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One finds here a sharp contrast between the statements of those who were engaged in writing the Rules and some of the District Judges who have the responsibility of applying the Rules when promulgated. Some, but not an overwhelming preponderance, of the judges have difficulty in believing that the Rules Committee really meant what it said. The following excerpts and citations show the clash of points of view:

"Hostility to 'fishing expeditions' before trial is a traditional and powerful taboo. To overcome its subtle influence requires more than logic and learning. Experience alone can effectively meet it." E. R. Sunderland, Foreword to Ragland, Discovery Before Trial, p. iii (1932).

"Adherence to the older method is due largely to the familiar fear of 'fishing expeditions.' It is true that fishing is likely to occur in oral examination, but when it is realized how little validity there is to the 'fishing' objection, and how much more definite the information obtained by oral examination is, there is no reason why this searching and flexible method should not normally be available for both depositions and discovery." "An appropriate pendant to it was the shibboleth—repeated to the point of nausea—that the court would not sanction 'fishing expeditions.'" J. A. Pike and J. W. Willis, The New Federal Deposition Discovery Procedure (1938) 38 Col. L. Rev. 1179 and 1436, containing a full discussion.

"Contrary to earlier limitations, the party may now engage in a 'fishing expedition.'" J. A. Pike, The New Federal Deposition-Discovery Procedure And The Rules of Evidence (1939) 34 Ill. L. Rev. 1.

"That the proceeding may constitute a 'fishing expedition' is not a valid objection to interogatories." A. Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure (1942) 41 Mich. L. Rev. 295.

In the same vein are Olson Transportation Co. v. Socony-Vacuum Oil Co., 8 Fed. Rules Serv. 34.41, Case 2 (D.C. E.D. Wis. 1944) and cases there cited; and Golden v. Ar-

Justice Holtzoff.[7] In speaking of discovery he says there are two guiding principles (page 70); "First, every party to a litigation is entitled to secure all evidence, information and documents germane to the issues, even if they are in possession of an adverse party. Second, such evidence, information and documents should be made available before the trial. The purpose is not only to facilitate the obtaining of evidence for use at the trial, but also to reduce the element of surprise to a minimum and shorten trials."

How much of a jolt this theory is to the practicing lawyer depends, in part, upon how far the practice with which he was familiar ~~before the Federal~~ Rules calls for something of the kind. The Rules probably go further than any State practice, but they are a much greater distance from the practice in some States than in others. See (1931) Note, 44 Harv. L. Rev. 633; "The Bill of Discovery Under Reformed Procedure."

We must start any discussion of the use of discovery in a particular case from the premise that the Rules are intended to go far in making information known by one party available to the other. Perhaps it is helpful if we start from a case which all would agree to be within the Rules and see how much further we are called to go here. Suppose the

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cadia Mutual Casualty Co., 6 Fed. Rules Serv. 34.41, Case 2 (D.C. N.D. Ill. 1942). Contra: For early statements antedating the new federal rules on this hoary question see Note 62 in Pike and Willis, The New Federal Deposition-Discovery Procedure (1938) 38 Col. L. Rev. 1179 and 1436. For federal decisions to the same effect, which arose later, see note 63 of the same article. More recent federal cases, contra, are: Walling v. R. L. McGinley Co., 4 F. R. D. 149 (D.C. E.D. Tenn. 1943); United Mercantile Agencies v. Silver Fleet Motor Express Inc., 4 Fed. Rules Serv. 34.11, Case 5 (D.C. W.D. Ky. 1941); Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 3 Fed. Rules Serv. 34.41, Case 6 (D.C. W.D. Pa. 1940); Welty v. Clute, 29 F. Supp. 2 (D.C. W.D. N.Y. 1939). A case that attempts to steer a middle course between the opposing shores of opinion is Pierce v. Submarine Signal Co., 25 F. Supp. 862 (D.C. D. Mass. 1939).

[7] New Federal Procedure in the Courts, 1940, published by the American Bar Association.

plaintiff needs the information contained in an operating report of a particular department of a defendant employer for a particular day. Such document, we take it, could be called for as a matter of course under the Rules.[8] Does the

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[8] The extent to which records in the files of a business organization have been thrown open to an adversary's inspection is indicated by the following cases: Cohen v. Beneficial Industrial Loan Corp., 8 Fed. Rules Serv. 34.41, Case 8 (D.C. D. N.J. 1945) Smith, D. J. (Inspection of books and records granted in stockholder's suit); Roth v. Paramount Film Distributing Corp., 4 F. R. D. 302 (D.C. W.D. Pa. 1945) McVicar, D. J. (Inspection of records of box-office receipts granted in anti-trust action); Walling v. Belikoff, 3 F. R. D. 92 (D.C. S.D. N.Y. 1943) Hulbert, D. J. (Inspection of records by Administrator permitted in action to enjoin violation of Fair Labor Standards Act.); Walling v. R. L. McGinley Co., 4 F. R. D. 149 (D.C. E.D. Tenn. 1943) Taylor, D. J. (Discovery of documents relating to wages, hours and duties of employees, records, schedules etc. granted in action under Fair Labor Standards Act). And discovery has also been permitted against the same governmental agency which utilized it in the latter two cases. See Walling v. Richmond Screw Anchor Co. Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D.C. E.D. N.Y. 1943) Moscowitz, D. J. (Names of allegedly underpaid employees in records of governmental agency not so privileged as to preclude discovery). Schultz v. Manufacturers & Traders Trust Co., 3 Fed. Rules Serv. 34.41, Case 3 (D.C. W.D. N.Y. 1940) Burke, D. J. (Inspection of corporate books of defendant granted in fraud action); Fishman v. Marcouse, 32 F. Supp. 460 (D.C. E.D. Pa. 1940) Bard, D. J. (Inspection of employee records of defendant company granted in Fair Labor Standards Action); Leimer v. State Mutual Life Assurance Co., 3 Fed. Rules Serv. 12b.31, Case 2 (D.C. W.D. Mo. 1940) Reeves, D. J. (Insurer ordered to produce copies of policies sued upon for inspection). An even wider latitude was granted in Gielow v. Warner Bros. Pictures, Inc., 26 F. Supp. 425 (D.C. S.D. N.Y. 1938) Conger, D. J. (Complainants' original manuscripts of stories and musical compositions opened to discovery by defendant in equity action).

At least one court has pointed out, however, that the inspection of corporate records is not all inclusive regardless

[fol. 95] demand in this case really go essentially further?[9] It is true that the defendants, through their lawyer, were diligent in going out and getting these statements before the plaintiff did. We have already indicated that this fact [fol. 96] does not prevent the other side from sharing the fruits of that diligence. The Rules sometimes speak of evidence. But whether the documents turn out to be com-

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of the nature of the suit: June v. George C. Peterson Co., 7 Fed. Rules Serv. 34.41, Case 1 (D.C. N.D. Ill. 1942) Holly, D. J. "I do not think Rule 34 requires the court in every case to order a corporate defendant to produce for the inspection of plaintiff, a stranger, all the records of its business affairs merely because plaintiff has filed a suit against it."

Where the documents do have some bearing, on the other hand, the courts have gone far in allowing inspection: The Prosperity Co. Inc. v. St. Joe Machines, Inc. 5 Fed. Rules Serv. 26b.31, Case 6 (D.C. W.D. Mich. 1942) Raymond, D. J. (Documents relating to date of conception or reduction to prior practice in patent case open to inspection); Conn. Importing Co. v. Continental Distilling Corp., 3 Fed. Rules Serv. 34.42, Case 1 (D.C. D. Conn. 1940) Hincks, D. J. (Copies of income tax returns not privileged against discovery); Fidelity & Casualty Co. Inc. v. Tarr Asphalt Trucking Co., Inc., 30 F. Supp. 216 (D.C. D. N.J. 1939) Fake, D. J. (Social Security records, Unemployment Compensation records and Income Tax records opened to discovery by plaintiff where defendant's books did not "furnish sufficient information as to whether or not the full amount of premiums [had] been paid * * *."). The examination of records has extended even to production of contracts with third parties: Moore v. C. A. Olsen Manufacturing Co., 8 Fed. Rules Serv. 34.41, Case 7 (D.C. N.D. Ohio 1944) (Inspection of subsidiary or collateral contracts with others granted in action for breach of contract or money had and received); Activated Sludge, Inc. v. Sanitary District of Chicago, 6 Fed. Rules Serv. 34.62, Case 2 (D.C. N.D. Ill., 1942) Lindley, D. J. (Defendant in patent case permitted to examine license contracts of plaintiff).

[9] Statements taken after accidents or injuries have been opened to inspection, and, again, as in the instance of the cases relating to discovery of an adversary's records (see f.n. 8) there has been no unreconcilable disagree-

petent as evidence themselves is not the test in discovery proceedings.[10] They may, nevertheless, contain statements [fol. 97] of fact which may be the source of other information which would be admissible at the trial. We think no distinction is necessarily drawn between oral and written statements. Doubtless the oral statements could not have been considered very important or they would have been

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ment among the courts: Eiseman v Pennsylvania R. Co., 3 F. R. D. 338 (D.C. E.D. Pa., 1944) Kalodner, D. J. "* * * I am of the opinion that the statements of the defendant's employees making reports as to the accident and submitted in the usual course of business following the accident are subject to the inspection of the plaintiff."; Rebheim v. Merritt-Chapman & Scott Corp., 2 F. R. D. 361 (D.C. S.D. N.Y. 1942) Bright, D. J. (Plaintiff permitted to examine pre-suit statements of officers of his vessel concerning his accident or injuries); Leach v. Greif Bros. Cooperage Corp., 2 F. R. D. 444 (D.C. S.D. Miss., 1942) Mize, D. J. (Inspection of plaintiff's own statement plus that of a witness, given to defendant by plaintiff's agent, permitted); Caroballo v. Export Steamship Corp., 3 Fed. Rules Serv. 34.411, Case 2 (D.C. S.D. N.Y. 1940) Hulbert, D. J. (Discovery of reports and statements obtained by adversary after accident and before suit, granted).

Inspection has even been granted to bills and vouchers relating to damages: Phoenix Insurance Co. v. Cline, 3 F. R. D. 354 (D.C. D. Mass., 1942) Ford, D. J.

An investigator's report in an action for malicious prosecution has also been held open to discovery: VanSant v. American Express Co., 8 Fed. Rules Serv. 34.41, Case 4 (D.C. E.D. Pa., 1944) Bard, D. J.

Documents pertaining to former litigation on the same subject matter have also been opened to inspection: E. W. Bliss Co. v. Cold Metal Process Co., 3 Fed. Rules Serv. 34.41, Case 1 (D.C. N.D. Ohio, 1940) Wilkin, D. J.

[10] "The examining party is not restricted to securing testimony that would be admissible in evidence at the trial. He may go further and obtain information that may be useful in securing such evidence." Holtzoff, New Federal Procedure And The Courts p. 75 (1940) published by American Bar Association. The same considerations that apply in Rule 26 apply in Rule 34 not to make admissibility

committed to writing, but if the Court sees fit to tell a party to write down what he remembers of a conversation we do not see why that recorded recollection may not be made available for what it is worth.

We have no desire to restrict the operation of the rules on discovery by the application of any notion of a semiproperty right in information one secures to use in a pending lawsuit against another. Nor do we balk at the notion that the hare may by discovery avail himself of the diligence of the tortoise. The policy back of all this has been discussed by experts in procedure in the Rules Committee and thoroughly debated there and elsewhere. It has become binding upon us by Supreme Court promulgation of the Rules. When such a policy has been adopted

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in evidence a test for laying bare the facts of the case before trial. Rosseau v. Langley, 9 Fed. Rules Serv. 34.41, Case 1 (1 C. S.D. N.Y. 1945) Goddard, D. J.; Walling v. Richmond Screw Anchor Co., Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D.C. E.D. N.Y. 1943) Moscowitz, D. J. (Rules permit inspection of hearsay documents though in this case the court exercised its discretion not to permit inspection); Machrer v. New York Central R. Co., 3 Fed. Rules Serv. 34.412, Case 1 (D.C. E.D. N.Y. 1940) Moscowitz, D. J.; Blank v. Great Northern Ry. Co., 4 F. R. D. 213 (D.C. D. Minn. 1943) Sullivan, D. J. (While court says that the document need not be evidence for the party asking inspection it seems to intimate in one place, however, that the document is open to discovery because it could be used as evidence by defendant). As a corrollary to the principle that admissibility is not a test for pre-trial discovery, Hoffman v. Palmer, 129 F. (2d) 976 (C. C. A. 2, 1942), affirmed 318 U. S. 109 (1943) indicates that inspection of a document does not make it admissible in evidence.

Contra: Condry v. Buckeye S. S. Co., 4 F. R. D. 310 (D.C. W.D. Pa. 1945) Schoonmaker, D. J.; Galbreath v. Bond Stores, Inc., 8 Fed. Rules Serv. 34.11, Case 1 (D.C. W.D. Mo. 1944) Otis, D. J. (Dictum to the effect that documents not admissible in evidence as hearsay or irrelevant would not be subject to discovery under Rule 34); Poppino v. Jones Store Co., 3 Fed. Rules Serv. 34.41, Case 2 (D.C. W.D. Mo. 1940) Otis, D. J. (No inspection of documents not admissible in evidence for moving party though they relate to adversary's case.)

either by rule-making court or legislature judges should go along wih it. We must not do with the Federal Rules what our forebears on the bench did to the Field Code and those patterned upon it.

The thing which gives us great concern in this case is the impact of the rules for discovery when they affect the lawyer-client relationship. Here is an instance which was discussed at the argument and answered squarely by counsel for appellee in his reply brief. The Court put this case: If a lawyer is required to disclose the results of his investigation into the facts, suppose a witness called by the lawyer for his client, in the course of cross-examination, makes a statement inconsistent with a former statement made to the lawyer and put into possession of the other side through discovery process. May not this lawyer be called to verify the terms of the original statement and thus become a witness against his own client? Appellee says yes and frankly states, "We see no reason why there should be any criticism of this practice."

[fol. 98] The Court does not take such a light-hearted view of the situation. Professional tradition that it is undesirable that a lawyer should be both advocate and witness for his client finds expression in Section 19 of the Canons of Ethics.[11] The lawyer as a witness against his client must have seemed too remote a possibility to the framers of the Canons to be included, for it is not covered expressly. Such a situation certainly puts the lawyer into the position where he cannot show that undivided allegiance to the client's cause which the relationship postulates. Must he, then, withdraw from the case? If so, there seems to be offered an easy and tempting means for the advocate for one side to get rid of a dangerous adversary.

Admittedly the Rules do not expressly cover the exact question presented here. Obviously its further considera-

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[11] "Appearance of Lawyer As Witness For His Client. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

tion by the Advisory Committee has emphasized rather than solved the difficulties inherent in the question.[12]

The Advisory Committee in its Second Preliminary Draft of Proposed Amendments, pp. 39-40, states that, "such files and their contents are not absolutely privileged" and add that "such files can [not] be delved into in every case without restriction." Of its own proposed amendment it says, "the principal objection to it is that it does not establish any standard for the exercise of judicial discretion * * *" It concludes with a plea that, "If the members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration." District Courts have for varying reasons, or no expressed reasons at all, reached conclusions both ways.[13]

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[12] Second Draft of Proposed Amendments to Federal Rules of Civil Procedure by Walter P. Armstrong (1945) 31 American Bar Association Journal 497 "Only in one instance does the Committee seem to have been unable to come to a definite conclusion. In dealing with the extent to which one may delve into an adversary's investigation file and examine statements of witnesses, photographs, maps, etc. procured in preparation for trial the Committee seems to have taken the counsel of despair."

[13] An examination of the District Court decisions in general accord with our view indicates the undefined extent and uncertain nature of their rationale. The cases are led by McCarthy v. Palmer, 29 F. Supp. 585 (D.C. E.D. N.Y. 1939), affirmed 113 F. (2d) 721, cert. den. 311 U.S. 680. Moscowitz, D. J.; the relevant language there is: "In connection with the particular evidence in question, a further problem was brought into focus, namely, the extent to which the new Rules of Civil Procedure permit the examination by one party of affidavits and similar materials secured by the other party by independent investigation incident to the preparation of the case for trial. While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances no such result

[fol. 99] Our consideration of the problem leads us to the conclusion that there is more in the exception of "privilege" than has been so far developed. First, on this point, let us look at the language of the Rules. Rule 26 (b), on the subject of depositions, says that the deponent may be examined "regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending [fol. 100] action." Rule 34 permits the ordering of pro-

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was intended." It should be noted that the principal issues in that case related to damages and the question whether inspection of a document made it admissible in evidence. Since affirmance on its salient issues this case has been questioned by its own circuit court of appeals in Hoffman v. Palmer, 129 F. (2d) 976, 996, affirmed 318 U.S. 109 (1943), which indicated a different view on the question of inspection making a document admissible. See Note in (1940) 53 Harv. L. Rev. 882 for further criticism. It has further been explained on its damages issue in Hetrick v. Reading Co., 39 F. Supp. 22 (D.C.D. N.J. 1941). Two other cases rely entirely on its authority to reach a similar conclusion: Piorkowski v. Socony Vacuum Oil Co., 4 Fed. Rules Serv. 34.411, Case 1 (D.C. M.D. Pa. 1940) Watson, D.J. and Courteau v. Interlake Steamship Co., 4 Fed. Rules Serv. 34.411, Case 2 (D.C. W.D. Mich. 1941). Two other cases also rely on it as precedent: In Zeoli v. New York Central R. Co., 8 Fed. Rules Serv. 34.411, Case 3 (D.C. E.D. N.Y. 1945) Kennedy, D.J. the court is more influenced by the fact that the documents did not "come under the regular entry rule" than by the factor of preparation for trial. In Byers Theaters v. Murphy (D.C. W.D. Va. 1940) Barksdale, D.J. the inspection was opposed by defendant only on the grounds of irrelevancy and confidential trade secrets. The case of Stark v. American Dredging Co., 3 F.R.D. 300 (D.C. E.D. Pa. 1944) Kirkpatrick, D.J., is also often cited. But in a later decision the same judge supported by the District Court en banc reached an opposite result. Hickman v. Taylor & Anderson is the later decision referred to, and that is the case out of which the present appeal has grown Nelson v. Reid, 4 F.R.D. 199 (D.C. S.D. Fla. 1944) Holland, D.J. cites the Stark case as its principal authority. Midland Steel Products Co. v. Clark Equipment Co., 9 Fed. Rules Serv. 34.411, Case 1 (D.C. W.D. Mich. 1945) Raymond, D.J. cites almost all the cases just discussed,

duction, inspection etc., of documents and other things "not privileged."

Now we get into deep water. Rule 33 (interrogatories), which the Committee Notes say incorporates Equity Rule 58, is by its terms applicable only to adverse parties, not their agents, nor, a fortiori, their legal counsellors. If the party is an association, corporation, or partnership,

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McCarthy, Courteau, Stark, Nelson as "the weight of authority" for the same view. Topolinsky v. Palmer, 8 Fed. Rules Serv. 34.411, Case 2 gives no citations at all in reaching a similar result. And Condry v. Buckeye S.S. Co., 4 F.R.D. 310 (D.C. W.D. Pa. 1945) Schoonmaker, D.J. reached the same result but on the ground that the documents involved were not "evidence material to any matter involved in the action" and were "not evidence at all * * *".

The cases apparently contra are equally cloudy in definition and limited in scope: Thus documents constituting part of preparation for trial have been held open to discovery unless privileged, or not specifically identified, or not material to the controversy, or in someone else's possession, but not immune from inspection merely because they are part of the preparation for trial. Rossean v. Langley, 9 Fed. Rules Serv. 34.41, Case 1 (D.C. S.D. N.Y. 1945) Goddard, D.J. (dictum); Farr v. Delaware, Lackawanna & Western R. Co., 8 Fed. Rules Serv. 34.35, Case 1 (D.C. S.D. N.Y. 1944) Hulbert, D.J. "The plaintiff is entitled to see any report which was made by any officer or employee made in the regular course of the performance of his duty in relation to the happening of the accident out of which this action arises. But any statement or other information acquired by or through the direction of counsel after notice of the accident and in furtherance of his preparation for the defense of the action, may be regarded as confidential, unless and until the same is presented to the court for examination and a specific ruling made with respect thereto."; Blank v. Great Northern Ry. Co. 4 F.R.D. 213 (D.C. D. Minn. 1943) Sullivan, D.J. "In the present case the statement was given by the adverse party, the plaintiff to the defendant's Claim Agent. There appears to be no reason for the protection of such statement as a privileged communication from the inspection thereof by the plaintiff."

special provision is made. On Rule 33 alone interrogatories were not authorized to be directed to Mr. Fortenbaugh, and he certainly could not be in contempt for failing to answer an interrogatory not authorized by the Rules.

But there is more to the story. Rule 26 (depositions pending action) allows the testimony of "any person, whether a party or not" to be taken by deposition "upon oral examination or written interrogatories." To have interrogatories addressed to one not a party to the litigation, therefore, the procedure must be under Rule 26, not Rule 33.

As already stated, Rule 26 has a privilege limitation upon the scope of examination. Rule 33 says nothing about privilege. We think that Rule 33 is subject to the same privilege limitation as Rules 26 and 34. One reason for so [fol. 101] concluding is that Rule 26 covers interrogatories as well as oral testimony, and the privilege Rule stated in 26 carries over to 33. Another reason is that we cannot believe that such omission was intended. We can see no logic in leaving it out of 33 and putting it in 26 and 34. And we cannot think a rule as old as that of privilege is to be lightly thrown overboard.

So now we have, upon examining the language of the Rules, pushed Mr. Fortenbaugh out from under Rule 33 but kept him in under Rule 26. We have the scope of examination under all three Rules subject to the limitation of privilege.

The heart of the case is what we put into that concept. The Rules, so far at any rate, do not give us the formula. Inspection of the dictionary upon the point proves stimulating to ideas, but not resolving of difficulties.

We do not doubt that privilege as used in the Rules includes all that is comprehended in the rule of testimonial exclusion of confidential statements made by a client to his lawyer.[14] That would not exclude the material asked for here, since the statements the lawyer got and interrogatories

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[14] Wigmore on Evidence (3rd Ed.) § 2292. "*(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose; (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.*"

asked for were not from the client but third parties. Such are not included in the rule of exclusion.[15] There are decisions which have extended the privilege to other situations.[16] These tend to show a feeling on the part of judges that "privilege" as the term is used in the Federal Rule and [fol. 102] "privilege" as one finds the term in the law of evidence as a ground for excluding testimony are not identical. We agree that they are not, but that fact does not take us very far along the road to settlement of our problem.

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[15] Wigmore on Evidence (3rd Ed.) § 2317.

[16] The English experience with discovery stems from O. 31,RRI-29. While the statute is not worded as our new Federal Rules are, the general analysis of that statute is helpful. Digest of The Law of Discovery with Practice Notes by Judge Bray (2nd ed.) p. 24 states, "The rules now provide that discovery is not to be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs • • • But in addition to this protection there are four grounds upon which it can be resisted as of right, (a) as being criminatory or penal, (b) as being within the doctrine of legal professional privilege, (c) as disclosing the party's evidence, (d) as being injurious to public interests." We do not mean to imply that the same four grounds can be used to resist discovery under the Federal Rules of Civil Procedure, but we do suggest that this serves as a convenient analytical pattern to separate the various types of cases that are loosely grouped under privilege in our own country.

Using the convenient breakdown so provided, we find many extensions of privilege in the American cases which seem to belong to the class delineated by Judge Bray as "injurious to public interests." These include: Bowles v. Ackerman, 4 F. R. D. 260 (D. C. S. D. N. Y. 1945) Bright, D. J. (O. P. A. served with subpoena duces tecum may not refuse to produce documents obtained from defendant on ground that the documents are considered confidential under Emergency Price Control Act); VanSant v. American Express Co., 8 Fed. Rules Serv. 34.41, Case 4 (D. C. E. D. Pa. 1944) Bard, D. J. (Reports of investigation into forgery granted inspection in action for malicious prosecution despite claim that public interest required nature

We are clear in our own minds, however, that "privilege" as used in the Rules comprehends the material asked for in the interrogatory which is the foundation of this proceeding, namely, memoranda of talks with witnesses, signed statements made by witnesses, the lawyer's recollection of talks with witnesses. Our difficulty comes, not in any lack of confidence in our judgment upon the point, but in seeking [fol. 103] a phrasing of our conclusion to give it wide enough scope without going too far. For instance, one is tempted to say that the lawyer's files are impregnable against any inquiry from outside. But that depends upon what the lawyer puts in them. A piece of a machine which has hurt someone, a document needed to show a fact, many things required in a lawsuit find their way from client's hands to lawyer's file and are not to be concealed until the day of trial for that reason. But here we are dealing with intangible things, the results of the lawyer's use of his tongue,

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and method of investigation to be secret. Court said secret or confidential elements of report could be preserved by appointment of a master); Walling v. Comet Carriers, Inc., 7 Fed. Rules Serv. 34.42, Case 2 (D. C. S. D. N. Y. 1944) Caffey, D. J. (No discovery of documents in custody of government when privileged because of regulation of Secretary of Labor prohibiting disclosure except with his consent). To same effect where order of Attorney General relating to documents of Department of Justice involved: United States ex rel. v. Bayarsky v. Brooks, 51 F. Supp. 974 (D. C. D. N. J. 1943) Fake, D. J. Cf. Walling v. Richmond Screw Anchor Co., Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D. C. E. D. N. Y. 1943) Moscowitz, D. J. "This court refuses to go so far as to decide that any and all records of a governmental agency are of a confidential nature and therefore privileged." Names of allegedly underpaid employees not so privileged. Western States Machine Co. v. S. S. Hepworth Co., 4 F. R. D. 766 (D. C. E. D. N. Y. 1941) Abruzzo, D. J. In a patent case "the discretion of the court should be exercised to prevent disclosure of trade secrets in advance of the trial"; Byers Theaters, Inc. v. Murphy, 3 Fed. Rules Serv. 34.41, Case 5 (D. C. W. D. Va. 1940) Barksdale, D. J. "Nor do I think that the prices, as shown by the contracts, partake of the nature of trade secrets or are confidential to such an extent as to give them any peculiar sanctity * * *".

his pen, and his head, for his client. This was talked about as the "work product of the lawyer" in the argument of the case. This is a phrase which seems pretty well to describe what we are after, though we hesitate to adopt it as a label for our concept for fear that it may contain implications not now apparent to us. It does with fair accuracy describe what we are excluding here under the term privilege. It seems likewise to be about what is represented by the English law though the difference in phraseology of the rules makes reference only moderately helpful.[17]

The reason for this frank extension of privilege beyond testimonial exclusion rests on the same foundation that the rule of evidence does. It is the same foundation upon which we base the immunity of the judge for his official acts in that capacity. It is found again in the non-liability of judge, counsel and witnesses for defamation for what they say in the trial of a lawsuit. In none of these instances is the immunity based on the convenience of the individual judge, lawyer or client. It is rather, a rule of public policy, and the policy is to aid people who have lawsuits and prospective lawsuits. Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers[18] and to have those advisers and other persons concerned in the litigation free to put their whole-souled efforts into the [fol. 104] business while it is carried on.[19] The soundness of this policy is not capable of laboratory demonstration. Enunciated and applied as it necessarily is by members of the guild which derives incidental benefit from its application, it is open to the gibes of the cynical. We believe it is

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[17] See authority cited in note 16.

[18] Wigmore (3rd Ed.) § 2291.

[19] The Restatement speaks of this policy in several places, thus Restatement, Torts § 586 Comment (a): "a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege [of defamation in judicial proceedings] is absolute." In Restatement, Torts § 637 Comment (a) the same view is expressed with respect to absolute privilege of attorneys in disparagement of property during judicial proceedings.

sound policy; we know that it is irrefutably established in the law. That the principle finds application in the facts presented to us on this appeal we are all thoroughly convinced.

The order of the District Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

[fol. 105] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, and Baltimore & Ohio Railroad Company

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR., Appellants

Present: Albert Lee Stephens, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges.

JUDGMENT—Filed December 10, 1945

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this court.

By the Court, Goodrich, Circuit Judge.

December 10, 1945.

[File endorsement omitted.]

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 106a] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—April 22, 1946

On consideration of the motion for leave to proceed *in forma pauperis* herein,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 107] SUPREME COURT OF THE UNITED STATES

* * * * * * * * *

ORDER ALLOWING CERTIORARI—May 27, 1946

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order of April 22, 1946, denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED,

Petitioner,

vs.

JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY, AND BALTIMORE & OHIO RAILROAD CO.;

JOHN M. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED,

Petitioner,

vs.

JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY, AND BALTIMORE & OHIO RAILROAD CO.;

JOHN M. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER

I

The Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 62a) was rendered on July 30th, 1945, and is reported in 4 F. R. D. 479.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, was rendered on December 10th, 1945 and is reported in 153 F. (2d) 212.

II.

Jurisdiction

(1) The Court of Appeals for the Third Circuit entered judgment herein, reversing the judgment of the District Court on December 10th, 1945.

(2) This suit was predicated upon the maritime law, as modified by the Act of Congress known as the Merchant Marine Act, March 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. A. 688.

(3) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347 (a).

(4) The order holding respondent in contempt was a final judgment and when that order was brought before the Court of Appeals, the Court acquired jurisdiction to review all phases of the case involving the merits as well as the order of contempt. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 66 L. Ed. 848.

(5) The jurisdiction is not qualified either as to subject matter or as to the nature of the decision of the Circuit Court of Appeals. Robertson and Kirkham, Sec. 114, P. 199.

(6) The Supreme Court should exercise its jurisdiction to review such a case of extraordinary and exceptional circumstances. *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 60 L. Ed. 715; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518,

41 L. Ed. 810; *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, 79 L. Ed. 439.

(7) Certiorari has been held to be appropriate to review an interlocutory decree of a Circuit Court of Appeals where the question of law involved was deemed to be "novel and important" and the position of the petitioner was one which, if correct, rendered the decision of the Court below, wholly void. *American Construction Company* v. *Jacksonville T. & K. W. Railway Company*, 148 U. S. 372, 37 L. Ed. 486. See also *Spiller* v. *Atchison, T. & S. F. Railway Company*, 253 U. S. 117, 64 L. Ed. 810; *George A. Fuller Company* v. *Otis Elevator Company*, 245 U. S. 489, 62 L. Ed. 422; *United States* v. *Gulf Refining Company*, 268 U. S. 542, 69 L. Ed. 1082.

III

Statement of the Case

This is a suit by the personal representative of a deceased seaman to recover damages for alleged wrongful death.

The decedent had been in the employ of the respondents Taylor and Anderson, as a member of the crew of respondent's Steamtug "J. M. Taylor." On February 6th, 1943, the tug was engaged in towing a car float of the Baltimore & Ohio Railroad across the Delaware River and in the course of the towing operation, the float became stuck in the bed of the river. It was decided to wait until the following morning before attempting to extricate the float and, in the meantime, the tug was anchored to the float. During the night the float came to the surface beneath the tug and caused it to capsize and sink with the loss of five lives. The decedent was one of those lost.

This action was instituted on November 26th, 1943, in behalf of the next of kin of the dececent and thereafter plaintiff filed a series of interrogatories which, among other

things, calls for a list of all persons who had made oral and written statements and for a copy of each such statement. Objections to the interrogatories were filed by respondents, which, after argument, were overruled. In answering the interrogatories, respondents stated that their counsel, Mr. Fortenbaugh, had taken the statements of the four survivors of the tug and had interviewed divers other persons, but declined to disclose the identity of the persons making any oral or written statements, other than the four survivors. The respondents also declined to produce either the statements of the four survivors or any other statements, except for a copy of the survey of the damage to the tug. Plaintiff thereupon moved for an order directing the respondents to disclose the identity of the remaining statements and records and to produce all written statements and memoranda of oral statements. Counsel for the respondents then submitted a typewritten statement and subsequently gave testimony for the purpose of the record showing how and for what purposes the statements were obtained. It appears from Mr. Fortenbaugh's statement and testimony that the investigation of the case was delegated to Mr. Fortenbaugh, as counsel, not only for the respondents Taylor and Anderson, but also for their underwriters (R. 59a). It was alleged further that Taylor and Anderson did not maintain any claims department of their own, but it was admitted that the underwriters did maintain their own claims department and investigation staff (R. 59a). Upon these facts the case was set down for argument. Because of the importance of the issue involved and because the District Judges recognized the necessity for a uniform rule to control all similar matters, all five of the District Judges sat as the Court *en banc*. The argument was participated in not only by counsel involved in the instant case, but the Court allowed the appearance as *amicus*

curiae of counsel for the railroads, steamship companies and insurance companies, all of whom argued in support of respondents' position.

The District Court, in an opinion by Judge Kirkpatrick, concurred in by the four remaining judges, granted petitioner's motion and held that respondents must produce all the statements and memoranda called for. The Court declined to extend the doctrine of "privilege" to cover statements obtained by counsel from third persons, while acting in the role of an investigator. The District Court accordingly entered an order directing respondents to disclose all the relevant documents.

A statement was thereupon filed with the Court signed by respondents Taylor and Anderson and by their counsel, Mr. Fortenbaugh, in which all three "decline to obey the order of Court" (R. 68a). The District Court then entered its order holding all three respondents in contempt of court and the appeal to the Circuit Court of Appeals followed.

The Court of Appeals reversed the District Court's order of contempt, upon the ground that all statements and memoranda procured by a lawyer were the so-called "work product" of the lawyer and therefore privileged from disclosure. In arriving at this conclusion, the Court enlarged the scope of the doctrine of "privilege" beyond the interpretation theretofore given to that doctrine under American jurisprudence.

IV

Specifications of Error

The Circuit Court of Appeals erred in the following respects:

First. In failing to follow the general rule of "privilege" which is limited to communications between counsel and client.

Second. In construing the term "privilege" as used in the Civil Rules to include communications and conversations between counsel and third parties having no relationship to the client.

Third. In characterizing statements taken from and conversations conducted with third parties as the so-called "work product" of a lawyer.

Fourth. In holding that the so-called "work product" of a lawyer includes statements and facts obtained from third parties, and that such statements and facts are "privileged" and exempt from the discovery provisions of the Rules of Civil Procedure.

Fifth. In holding that strict compliance with discovery provisions will result in a divided allegiance on the part of counsel in violation of the canons of ethics.

ARGUMENT

Summary of Argument

Petitioner contends that the discovery provisions of the Civil Rules should be construed to mean exactly what they say. Rules 26 to 34 provide that any party may be required to disclose *all* the facts within his knowledge or control, subject only to *two* exceptions; first, that those facts be *relevant*, and second, that they be not *privileged*. It is the latter exception which is the core of the controversy here. Petitioner contends that the term "privilege", as it is used in the Rules, should be limited to communications between counsel and client and no further. This is in accordance with the interpretation which has been placed on that term since time immemorial in American Jurisprudence. The District Court so held and directed the respondents to disclose the data which counsel for the respondents had learned from third parties. In reversing the District Court, the

Court of Appeals reached the conclusion that all facts obtained by the lawyer, including information secured from *third parties*, should be exempt from disclosure. The Court of Appeals, however, recognized that such an exemption could not be justified under the generally accepted interpretation of "privilege", so it enlarged the scope of that term to include the so-called "work product" of the lawyer. The Court then committed what we consider to be further error by including within the so-called "work product" of the lawyer all the factual information or data which is obtained by the lawyer.

It is petitioner's contention that the Court of Appeals, by enlarging the exemption on the ground of privilege thereby abrogated the express purpose of the Rules and in effect made impotent those discovery provisions which were intended to benefit a most substantial segment of the people. The exemption from disclosure was intended by the draftsmen to be restricted to its narrowest limits thereby requiring the disclosure of all possible facts and data, and thus eliminating the "sporting theory" of justice. The decision of the Court of Appeals would defeat that purpose and on the contrary, would leave one type of litigant such as a corporation or insurance company with a tremendous advantage over the individual litigant. The former can plead that all or most of the material information pertaining to the litigation was developed by their counsel and is, therefore, privileged. The latter, being an individual and necessarily having direct knowledge of the matter in controversy, could be compelled to disclose all intimate details, either by oral examination under Rule 26(b), or by the interrogatories under Rule 33. Thus, the corporation could ascertain all of the opponent's case without having to reveal its own data, simply because it was gathered by its counsel instead of its own employees or investigators.

Having brought the lawyer's "work product" into the exemption of privilege, the Court of Appeals then placed an extraordinary interpretation upon that so-called "work product" so as to include not only the lawyer's theories, opinions, conclusions and other mental processes, but also all those facts and data procured by the lawyer or under his direction. It is petitioner's position that the facts in any case are always fixed and there is nothing that the lawyer can do which can have the effect of changing those facts. Those facts cannot therefore be considered in any degree as the "work product" of a lawyer.

Petitioner makes the following contentions:

(1) The purpose of the discovery provisions of the Federal Rules is to eliminate the element of chance from litigation and assure a determination of each controversy on the merits.

(2) The scope of discovery under the Federal Rules permits the widest latitude in ascertaining before trial the relevant facts concerning the real issues in dispute, subject only to the limitation of privilege.

(3) The limits of privileged matters exempt from discovery include only communications between counsel and client and does not extend to matters between counsel and third parties.

First Point

The purpose of the discovery provisions of the Federal Rules is to eliminate the element of chance from litigation and assure a determination of each controversy on the merits.

Before the adoption of the Federal Rules of Civil Procedure, neither party to a litigation could discover any data in the possession or knowledge of the other. Except where a document was made in the regular course of an opponent's business, a party could not ascertain from any

other party what evidence or facts were available relative to the issues at hand. The technical rules of practice protected a wrong-doer in many instances because the disclosure of facts which were in his possession could not be compelled, with a resulting miscarriage of justice. Under the old law also, the trial of a law suit very frequently developed into a battle of wits between counsel, each party attempting to keep the other in the dark as much as possible. The Federal Rules of Civil Procedure, *inter alia*, were intended to overcome and eliminate exactly that situation. The Rules were designed to take the so-called "sporting theory of justice" out of the trial of a law suit and to reduce to a minimum or wipe out entirely the element of surprise by making available to all parties all facts which had any relevancy to the proceedings regardless of whether those facts or documents be within the knowledge or custody of an opposing party or third party.

The discovery provisions of the new Rules were intended to afford to all of the parties an opportunity of utilizing all the relevant material wherever it might be located. The purpose of the discovery provisions of the Federal Rules was stated in *Mackerer* v. *New York Central Ry. Co.*, 1 F. R. D. 408, where the Court, quoting with approval from an article by Justice Holtzoff, said:

> "The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice,' to provide efficient machinery for the ascertainment of truth; and to expedite a determination of each controversy on the merits."

Some Courts found it difficult to follow the clear mandate of the Rules requiring disclosure and seized upon collateral considerations to defeat the very purpose of the

Rules, as in *McCarthy* v. *Palmer*, 29 F. Supp. 585, where the Court very narrowly construed the discovery provisions because they "would penalize the diligent and place a premium on laziness." This position, of course, completely defeats the express purpose of the Rules which seek to develop the true facts, and it should not matter whether counsel be lazy or diligent or that one be more resourceful than the other. The most important consideration beyond all others is that the true facts should be presented to the Court and no collateral incidents should be permitted to nullify or impair that objective. The *McCarthy* case was severely criticized and disapproved in *Seligson* v. *Camp Westover, Inc.*, 1 F. R. D. 733, where the Court went so far as to permit an examination of the defendant's insurance carrier before trial. In this connection, the Court said:

> "The Court realizes that in most instances the insurance company is the real party in interest and not the assured. It has been held that permitting such an examination 'would penalize the diligent and place a premium on laziness.' McCarthy *v.* Palmer, D. C. 29 F. Supp. 585, 586. Assuming that this necessarily follows, it must be kept in mind that the new Rules of Civil Procedure are fashioned to eliminate the old concept of litigation as a battle of wits and to provide the tools whereby the facts from which the truth may be more easily ascertained and substantial justice done. *To the extent that this search for the truth infringes on the convenience of litigants, such convenience must yield to that extent.*"

It is fair to state, therefore, that the Federal Rules were intended to enable the parties to discover the true facts and compel their disclosure wherever they might be found. The purpose of the Rules as otherwise expressed is to assure that the litigation will be conducted "with all the cards on the table."

SECOND POINT

The scope of discovery under the Federal Rules permits the widest latitude in ascertaining before trial the relevant facts concerning the real issues in dispute, subject only to the limitation of privilege.

The provisions relating to discovery are found in Rules 26 to 37 of the Federal Rules of Civil Procedure. The particular Rules which are involved in this argument are 26, 33 and 34. Rule 26(a) provides that the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition, upon oral examination or written interrogatories, for the purpose of discovery or for use as evidence in the action or for both purposes. Rule 33 provides for interrogatories directed against the parties themselves, and Rule 34 covers the dicovery and production of documents and things for inspection, copying or photographing. The scope of examination under these Rules is defined in Rule 26(b) which provides specifically that the deponent may be examined regarding *any relevant matter which is not privileged.* This scope has been held to be applicable to all three of the aforementioned Rules. The scope of the discovery provisions of these Rules is considered in an extremely able article by Justice Holtzoff in 41 Mich. Law. Rev. 205, where the author summarizes the weight of authority as follows:

> "From the very inception, the principle was enunciated by the Courts that the scope of examination on interrogatories is co-extensive with that permitted under the rules relating to depositions. *Specifically, interrogatories need not be confined to securing evidence that would be admissible at the trial, but may include inquiries for the purpose of eliciting information leading to the procurement of such evidence.* They need not be limited to ultimate facts, but may extend to

detailed items of evidence.' *That the proceeding may constitute a 'fishing expedition' is not a valid objection to interrogatories.* As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them. A liberal attitude on this point will promote the ends of justice." (Italics ours)

The same general rule was laid down and followed in *Nichols* v. *Sanborn Company*, 24 Fed. Supp. 908, as follows:

(p. 910) "It is perfectly apparent that Rules 26 to 37 inclusive, of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c relating to depositions, discovery, depositions on oral examinations and written interrogatories, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and the admission of facts and genuineness of documents were formulated *with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute*, and permitting interrogatories to parties in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided at the trial and eliminate all expense and difficulty that would be involved in their production at the trial. They were formulated with a view to simplifying the issues . . .

"In this connection it is well to note that Rule 26 (b), 28 U. S. C. A. following section 723c, dealing with the scope of examination in depositions permits examination 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.'"

"The restrictions which hampered Equity Rule 58 are not applicable to discovery under Federal Rule 33; it should be noted that Rule 33 does not expressly define the scope of discovery permitted under it. Since there is an unlimited right to discovery by taking depositions upon oral examination or upon written interrogatories, the silence of Rule 33 on this matter must be construed to permit discovery of the same scope."

See also:

Heublein v. *Bushmill*, 2 F. R. D. 190 (D. C. Pa.);
American etc. Corp. v. *American Oil Co.*, 25 F. S. 386;
Loughran v. *Zimmelman*, 28 F. S. 348;
Brewster v. *Technicolor Inc.*, 2 F. R. D. 186;
Schoeneman v. *Brauer*, 1 F. R. D. 292;
American Lecithin Co. v. *Cleary Corp.*, 1 F. R. D. 603;
Pirnie v. *Andrews*, 1 F. R. D. 253;
Mackerer v. *N. Y. Cent. R. Co.*, 1 F. R. D. 408.

It will be recalled that the only two conditions imposed on the right of discovery are that the matters sought must be relevant and not privileged. The term "relevancy" as used in the Rules means in substance and effect *relevancy to the proceedings and not relevancy to the ultimate facts in issue.* The distinction between a search for evidentiary facts and an inquiry into ultimate facts has been abolished. *Schoeneman* v. *Brauer*, 1 F. R. D. 292. Similarly, objections to motions for discovery based upon admissibility, competency and materiality furnish no basis for denying the right to discovery; *Houghton Mifflin Co.* v. *Stackpole*, 1 F. R. D. 506; *Pirnie* v. *Andrews*, 1 F. R. D. 253; *Byers Theatres* v. *Murphy*, 1 F. R. D. 286; *Brewster* v. *Technicolor Inc.*, 2 F. R. D. 186; *DeSeversky* v. *Republic Av. Corp.*, 2 F. R. D. 183.

An excellent analysis of the Rule is set forth in *Lewis*

v. *United Airlines Transport Corp.*, 27 Fed. Supp. 946, wherein the Court said:

> ". . . That the examination may develop useful information by way of discovery which may not be admissible or material upon the precise issue is aside from the point; to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible."

It is clear beyond doubt that the scope of the discovery provisions is sufficiently broad to compel disclosure of all relevant matters and to assure trial on the merits. The Court below was in complete accord with that general rule, but because of the "impact" on the lawyer-client relationship, the Court below extended the "privilege" so as to exempt from disclosure those statements procured by the lawyer. An analysis of the term "privilege" and its origin convinces that the Court below fell into error on this point.

THIRD POINT

The limits of privileged matters which are exempt from discovery include only communications between counsel and client and do not extend to matters between counsel and third parties.

It is no longer open to dispute that every party has an unlimited right to discovery of all relevant material in the possession of every other party with the sole exception made for privileged matters. In outlining the rule and the exception, Justice Holtzoff, in 41 Mich. Law Rev. 205, stated:

> "The elimination of the 'sporting theory' of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great ob-

jectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery, by which a disclosure may be obtained in respect to all pertinent information in the possession of any party to a litigation. An exception is, of course, made for privileged matter. *It is one of the basic theories of the new procedure that every party to a law suit is under a duty to reveal to any other party all pertinent data in his control, with the sole exception just mentioned.* Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules." (Italics supplied.)

It is obvious that the draftsman of the Rules intended to give the discovery provision as broad an application as possible and in order to effectuate that purpose, the Rules must be read in a light which restricts the exception of privilege to its narrowest bounds. It is fair to suggest that if it were intended to broaden or extend the privilege beyond its usual and legally recognized meaning, then the draftsman would unquestionably have inserted an appropriate provision into the Rules themselves. It will be seen that in certain special instances, legislation has been passed to extend privilege to additional material not ordinarily within the Rule. It follows that if the draftsmen of the Civil Rules intended to enlarge the "privilege", they would likewise have so expressed that intention in fitting terms. In the absence of any such extension attached to the Rules, we submit that the privilege referred to in the Rules must be construed in its customarily accepted legal meaning, and if there must be a change, then the boundaries of "privilege" should be narrowed rather than enlarged, in order to give effect to the liberal provisions of the Rules.

A brief review of the nature and origin of privilege may be helpful in the consideration of the problem at hand. In Cyclopedic Law Dictionary, Third Edition, P. 877, privi-

lege was recognized as being associated under the following circumstances:

> "In Evidence, Communications which the law refuses, on grounds of public policy, to allow to be disclosed in evidence. The policy prohibiting such disclosure may be (1) political, as that restraining the disclosure of secrets of state, (2) judicial, as that which prohibits the disclosure of proceedings in the jury room, (3) professional, as that which forbids the disclosure of statements by client to attorney, or (4) social, as that which restricts the disclosure of communications between husband and wife."

It will be noted that so far as attorneys are concerned, the Rule is limited to attorney and client, and there is no implication that it applies between attorneys and third parties. This will become more evident from further analysis.

One of the most able discussions of privileged material is set out in Wigmore on Evidence (3rd Ed.); Section 2290 develops the origin of the term as follows:

> "History of the Privilege. The history of this privilege goes back to the reign of Elizabeth, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (ante § 1364) and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (ante § 2190) it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commanded itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion."

The theory behind the Rule originally differed from that which is the basis of privilege in the present day. Originally: (Vol. VIII, p. 547)

"But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one,—a consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client. How significant the 'point of honor' was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (ante, § 2286). Clearly, the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.' If the 'point of honor' was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

"That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (ante, § 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law.

"Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser (post, § 2291). It proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law."

The policy of the privilege is stated in Section 2291, p. 550:

> "The policy of the privilege has been plainly grounded since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory. In short, all four of the elements already noted (ante, § 2285) as essential to such a privilege are here deemed to exist."

The four elements referred to above in Section 2285 are as follows:

> "(1) The communications must originate in a confidence that they will not be disclosed;
>
> "(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> "(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
>
> "(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

In considering certain extensions of privileges accomplished by means of legislation, Wigmore takes occasion to point out that those tendencies are unwholesome and should be restricted rather than enlarged: (Vol. VIII, p. 539)

> "Novel Privileges. Of recent years, there have appeared on the statute book of several Legislatures certain novel privileges of secrecy. Their history has not been traced; but they bear the marks of having been enacted at the instances of certain occupational organizations of semi-national scope. The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it

some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.

> "'The analogies are not convincing (though this is not the place for a demonstration). Moreover, the tendency is an unwholesome one. Yet it threatens to spread not only to other Legislatures but to other occupations. *The correct tendency would rather be to cut down the scope of the existing privileges, instead of to create any new ones.*'" (Italics supplied)

After considering at some length the effect of the Rule on the development of the truth, Wigmore goes on to say: (Section 2291, p. 557)

> "Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. Even the answers to Bentham's argument concede that it is accurate and well-founded in its application to a certain proportion of cases. It is worth preserving for the sake of a general policy; *but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.*" (Italics supplied)

The general principles and statutory definitions which control the privilege as between attorney and client is set forth in Section 2292 as follows:

> "General Principle; Statutory Definitions. The phrasing of the general principle, so as to represent all its essentials, but only essentials, and to group them in natural sequence, is a matter of some difficulty. The following form seems to accomplish this:
>
> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure

by himself or by the legal adviser (8) except the protection be waived."

It is significant to note that in all of the definitions and rules which deal with "privilege", the bounds never go beyond the client-attorney relationship, and even with respect to that relationship, not every communication and matter is protected. No inference can be drawn from any of those rules or definitions which can conceivably cover any communication or matter between attorney and third party. In fact the basis of the Rule itself repudiates any such suggestion.

Wigmore significantly points out that "privilege" is not applicable to knowledge acquired by the attorney from third persons and the following excerpt is peculiarly applicable as follows: (Section 2317, p. 615-616)

> "1. The privilege is designed to secure subjective freedom of mind for the client in seeking legal advice (ante, §2291). It has no concern with other persons' freedom of mind, nor with the attorney's own desire for secrecy in his conduct of a client's case. *It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particuler third person for the benefit of the client.*" (Italics supplied)

The same general rule is expressed in *Ruling Case Law*, Vol. 28, Sec. 143, page 553, as follows:

> "The testimony of a witness as to conversations with a party to an action cannot be excluded merely on the ground that the witness is an attorney at law, and that the communication was confidential, unless it also appears that he was the attorney for the party, and that the communications were made in the course of such professional employment. In other words, to exclude declarations as communications to counsel,

or made with a view to employment, *their root in the relation, or contemplated relation, of client and attorney must be manifest.* They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it." (Italics supplied)

The Rule relating to privilege, particularly as it affects the right to discovery, is analyzed in *American Jurisprudence*, Volume 17, Sec. 28, page 21, as follows:

"Communications to an attorney are not privileged from discovery where the confidence is given before the relationship of attorney and client is formed or after it has ceased, *or where the information is acquired by the attorney from persons other than his client, although such information is obtained while the attorney is acting as counsel.* Generally speaking, an attorney may be compelled to produce books and papers which do not constitute confidential communications and which are not received by him for the purpose of consultation, as where they are placed with him for mere safekeeping. *The test generally applied is whether the client is bound to produce the papers. An attorney can be compelled to produce in evidence any paper or record in his possession belonging to his client which the client himself could be compelled to produce.*" (Italics supplied)

To recapitulate, the exemption from disclosure upon the ground of privilege has long been recognized in the law but because it is, as Wigmore points out, "an obstacle to the investigation of the truth", the exemption is limited to the narrowest possible bounds and before any claim of privilege can be allowed, it must necessarily be shown that the information or communication in question was made in confidence to the professional legal adviser pursuant to the relationship of lawyer and client. Thus, by its very terms, as well as because of the reason for the very exist-

ence of the rule no information or communication obtained from a *third* party can possibly be exempt as privileged.

The Court of Appeals recognized that statements procured by a lawyer from third parties cannot ordinarily be exempt from disclosure under the generally accepted legal concept of the doctrine of privilege. However, the Court felt compelled to depart from the general and long established rule because of "the impact of the discovery provisions of the rules on the lawyer-client relation." It is suggested by the Court below that if counsel were required to make disclosure of a statement which he had obtained from a third party, and if thereafter that third party was called as a witness and gave testimony on the stand different than that which he stated to the lawyer, the lawyer could then be called to contradict that witness at the instance of the opposing counsel. The Court below felt that under these circumstances the lawyer would be testifying against his own client and in effect, would be violating the canons of ethics. Solely because of this consideration did the Court below feel obliged to create a most substantial extension to the general rule of privilege. We respectfully submit that the conclusions of the Court below cannot stand analysis, and in enlarging the rule, the Court completely destroyed the very basis for the rule itself.

It is pertinent first to consider the so-called "impact on the lawyer-client relationship." There would be no quarrel if the facts in question were known to or learned by the party himself either by his own investigation or through a lay investigator. Under these circumstances, it is conceded by all concerned that the information would not be privileged. Nor could it be seriously disputed that the party himself could be required to testify under oral examination concerning all of these facts which he learned directly or through a lay agent. In so doing, that party is in effect

testifying against himself, and this is precisely what the Rules of Discovery were intended to accomplish in order that all parties should have as complete access as possible to all the facts in the investigation of the truth. If, however, the investigation is made by the lawyer rather than by an investigator and the lawyer is then called upon to make disclosure of the facts, he is not being called upon to do more than that which is required of his client. In this connection, we submit that when a lawyer personally engages in the investigation of the facts from third persons, his position is no different than that of any ordinary investigator and the fruits of that investigation should not be regarded any differently. It is an accepted doctrine that where a client loses his "privilege" as by waiver, the lawyer cannot claim it. Similarly where the client has no privilege as by operation of law, none can exist in favor of the lawyer. The suggestion that there is an unjust impact upon the lawyer-client relationship from the lawyer's disclosure of those facts is thus a fallacious premise since the lawyer does no more than that which the client must do under the rules.

Referring to the ethical problem involved, we earnestly suggest that the Court again overlooked the basic problems involved. If this were a situation where counsel voluntarily took the stand to deliberately testify against his own client, there might be some question of ethics involved. Here, the lawyer does not take the stand voluntarily, nor does he intend to testify *against* his client. On the contrary, his disclosures are by compulsion, and under no circumstances can he be accused of any dereliction or lack of zealousness in his client's behalf. In the past, lawyers have been called by their adversaries to contradict something that a witness had testified to under oath and that practice could never be successfully opposed upon the ground of privilege. In this respect, therefore, the Rules of Discovery have not made

any change in the law, but may possibly increase the number of occasions when a lawyer may be so called to repudiate a perjuring witness. In this connection, it must also always be borne in mind that the trial Court may exercise its discretion in controlling the situation as it has in the past. We respectfully submit that there is not the slightest suggestion of any violation of the rules of ethics in connection with this practice. If the point should be decided from the standpoint of ethics, we think that legal ethics would require the lawyer as an officer of the Court to repudiate the testimony of any witness who had perjured himself. We have never understood legal ethics to justify any lawyer in standing mute when of his own knowledge he knows that a witness has perjured himself. From any viewpoint, we submit that the conclusions of the Court below were erroneous and from the standpoint of privilege, we do not see how the extension created by the lower Court can possibly fit into or have any place in that category.

Having created an extension to the doctrine of privilege, the Court appreciated that it was inviting trouble and would completely emasculate the discovery provisions of the Civil Rules unless some limitation could be imposed upon the new extension. The Court finally adopted with some misgivings the so-called "work product" of the lawyer in definition of the extension. Here again, the Court completely misconceived the functions of the lawyer. If we accept the phrase "work product" in its ordinary meaning, it could only be construed to imply that which the lawyer has himself created such as his theories, his opinions, his conclusions and inferences from facts or law. These are truly the "work product" of a lawyer. On the other hand, no amount of ingenuity or skill on the part of a lawyer can alter or change in the slightest degree the true facts in any case. The fact that the lawyer merely has uncovered certain facts

does not even remotely give rise to the suggestion that those facts are his "product." While the lawyer may draw the most ingenious inferences from the facts, yet there is nothing that he can do which will change in any way the facts.

The unsoundness of the Circuit Court's holding in this respect becomes more evident when the theory upon which the holding is based is taken another step toward its logical conclusion. In *Shields* v. *Sobelman*, 9 F. R. S. 26 b. 211, (case 5) the plaintiff sought the production of pictures which had been taken of the scene of the accident immediately after the occurrence. The defense was raised that the pictures were taken under the supervision of the lawyer and that they were therefore privileged. Although the District Judge ordered these particular pictures produced, he nevertheless acknowledged that, under the rule laid down by the Court of Appeals in the *Hickman* case, the claim of privilege could apply equally to pictures as well as to statements, as follows:

> "The question presented is not free from doubt. I cannot see very much distinction between a statement of a witness taken by a lawyer and a photograph taken, to all intents and purposes, also by a lawyer. Of course, the lawyer does not actually press the release of the camera that takes the picture, and does not develop the photographs; but they are made as he directs and they are evidence in the case, exactly as the statement of a witness is in evidence in the case, and into them both go some of his legal knowledge as to what is relevant and what is not, and what is evidence it behooves his client to be prepared to present."

By a similar process of reasoning, anything that the lawyer comes into contact with is as if touched by a magic wand and automatically becomes privileged from disclosure to any other person or party. We submit that this is a

wholly erroneous view of the "work product" of a lawyer. The lawyer cannot apply his mental processes to mould the facts in the light most favorable to his client. On the contrary, the canons of ethics require him to accept the facts as they are and present his client's case without altering those facts to suit his client's convenience or wishes. The lawyer is free to exercise his mental processes and his reasoning to the fullest extent, in the interpretation of facts and the law as applied thereto, but not to change or alter those facts. He cannot create the facts or bring them into being. The facts are already there when the lawyer enters the picture. The facts, therefore, cannot be said to be the product of the lawyer. We submit, therefore, that the Court of Appeals committed error in holding that the facts elicited from witnesses constituted a part of the "work product" of the lawyer.

The adoption of the Rules of Civil Procedure came as a rude jolt, as the Court below stated, to the practicing lawyer and to some Courts. Although the language of the Civil Rules is unambiguous and clear, yet some District Courts simply refuse to believe that the rules were intended to go as far as the plain meaning of the language used required. On the whole, however, after the Rules had been in operation for a short while, the general tendency of the Courts was to place a liberal rather than a restrictive construction upon the rules. In the District Court below, before the decision in the instant case, the several Judges were of varying opinions concerning the interpretation of the rules, and it was because of the lack of unanimity and because of the importance of the question involved that the District Court decided to sit *en banc* in order to fix a uniform rule. Because the principle involved governed practically all of the litigation before the Court, the bar was invited to attend and participate in the question in the instant case. It

was only after full hearing was accorded not only to the instant parties, but to all who desired to be heard that the District Court rendered its decision and held that statements procured by a lawyer from third parties could not be exempt from disclosure upon the ground of privilege. In this connection, the Court made the very pertinent observation:

> "The question of privileged communications between attorney and client is another matter and is governed by rules of law. Of course, the Court may not, in exercising its discretion, transgress those rules. *However, the mere fact that statements of third parties have been taken by an attorney does not of itself give rise to the privilege. In such case the lawyer is merely the medium through which his client becomes apprised of facts and his intention to transmit them to his client does not make the facts privileged from disclosure in answer to interrogatories.* We think that none of the statements made by witnesses in the present cases are protected by any rule relating to privileged communications between attorney and client." (Italics supplied.)

In other jurisdictions, similar reasoning was followed, as in *Seligson* v. *Camp Westover, Inc.*, 1 F. R. D. 733, where the plaintiff sought an examination of the defendant's insurance carrier before trial. The Court said:

> "Insurance companies occupy no different status from that of any other litigant. *To permit such a company in a negligence suit to evade examination on any theory other than privilege would amount to an emasculation of the liberal provisions of the new rules*, insofar as a plaintiff in such litigation is concerned. Nothing is shown in the moving papers from which this court could find that the matter sought to be obtained is privileged. *The mere fact that such information is in the hands of an insurance company or its attorney*

does not, in and of itself, make such information privileged." (Italics supplied.)

In *Colpak* v. *Hetterick et al.*, 40 Fed. Supp. 350, the defendant's insurance company, by its chief claim agent, was required to exhibit and furnish to the plaintiff's attorney certain copies of written statements made by the defendant and in the possession of the insurance carrier.

In *Price* v. *Levitt*, 1 Fed. Rules Service 350, the Court held that the plaintiff was entitled to take the deposition of the officers of the insurance carrier concerning written statements obtained by the company, and held further that those statements were not privileged, and could not be made so merely because they were turned over to counsel.

In *Lewis* v. *United Airlines Transport Corp., supra*, the Court held that only that information in the possession of counsel is privileged which represented a communication between counsel and client himself, and the privilege did not extend to reports made to the attorney by other persons.

In *Bough* v. *Lee*, 29 Fed. Supp. 498, it was held that the question of privilege could not be raised as between insurance company and attorney, nor could the attorney claim privilege for any document obtained by his own investigator.

In the matter of examination of the Citizens' Casualty Company of New York, 7 Fed. Rules Service 521, the Court pointed out that where the facts of statements elicited were otherwise relevant, the fact that they were taken and the investigation made by an attorney of the insurance company does not make the documents privileged. On the contrary, said the Court, "That information is not confidential, but is a legitimate source of inquiry."

The decision of the Court of Appeals below is in direct conflict with the decision in the case of *Hoffman* v. *Palmer*, 129 Fed. (2d) 976, affirmed 318 U. S. 109, decided by the

Second Circuit Court of Appeals. It is interesting to note that the Court below cited from the opinion in that case, and although a different conclusion was reached, no attempt was made to distinguish that decision. The facts in the *Hoffman* case are briefly these. One of the plaintiff's witnesses testified on cross-examination that before the trial he had given a written statement to the plaintiff's attorney. In the course of the trial, defendant's attorney asked for the production of the statement while the witness was under cross-examination. The Trial Judge refused to compel the production of the statement unless counsel would agree that it be admitted into evidence. Defendant's counsel refused to accept the condition imposed by the Trial Judge, and withdrew his request under protest and subsequently assigned the ruling of the Court as error when the jury returned a verdict in favor of the plaintiff. The Court of Appeals held that the Trial Judge should have permitted counsel to examine the statement as though its production had been requested under Rule 26. It will thus be seen that the question presented in that case was identical with the issue before the Court in the instant case. In reaching the opposite conclusion from that of the Court of Appeals at bar, the Court made this pertinent statement:

> "Some lawyers also grumble, saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. *But the reformers are surely right in replying that 'unfairness' to a diligent lawyer is of no importance as against much-needed improvement in judicial ascertainment of the 'facts' of cases; the public interest in such ascertainment is paramount.*"
>
> * * *
>
> "At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic

as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it, *The judge should have dealt with the request as if it had arisen under Federal Rules of Civil Procedure, rule 26 (b).*" (Italics supplied.)

We submit that the Court of Appeals in the instant case should similarly have subordinated the lawyer's convenience or embarrassment "to the judicial ascertainment of the facts" and considered that, "the public interest in such ascertainment is paramount". We think the same principle applies with peculiar force to the facts at bar. Whatever embarrassment may be entailed in those rare situations where the lawyer may be called to prove a statement which he himself took, is completely overshadowed in importance by the justice which will result from the ascertainment of the true facts, and the "benefit gained from the correct disposal of the litigation". (*Wigmore, supra.*)

Under the rules as presently framed, it is respectfully submitted that the Court below was in error in holding that the statements procured by counsel were exempt from disclosure. In this connection, it is appropriate to consider the proposed amendment of the Advisory Committee to Rule 30 (b) which would completely make impotent all of the discovery provisions of the Rules of Civil Procedure and which is a complete reversal of policy on the part of the Committee from its original intention to eliminate the sporting theory of justice from tthe trial of a lawsuit. The proposed amendment is as follows:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court is satisfied that denial of production or in-

spection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not orden the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert."

It will be noted at the outset from the proposed amendment that the Advisory Committee would close the door to the investigation of the truth even more tightly than does the decision of the Court of Appeals below. Under the new proposal, as soon as an investigation is undertaken, either during or in anticipation of a litigation, not only by counsel, but by any party or his insurance company, then the fruits of that investigation are immediately placed beyond the reach of the other party. The provision that the disclosure of the information may be compelled if the Court is satisfied that the denial of its production or inspection will unfairly prejudice the parties seeking the production or inspection is from the practical standpoint a most inadequate provision, as well as one which unquestionably will tend to create confusion and a complete lack of uniformity. To begin with, the entire object of the Rules of Discovery is to delve into the other party's knowledge in an effort to ascertain all of the true facts. Until a party knows what the facts are, it would be virtually impossible in most instances to show that there has been prejudice even though in most instances, there must actually be prejudice. Lack of knowledge of what the facts are, or particular evidence may be, precludes a showing of any such prejudice. As a practical matter it would be impossible to show prejudice under the circumstances. Thus the provision is a completely empty gesture by the framers of this proposal. The proposed

amendment follows along the lines of the decision in *Stark* v. *American Dredging Company*, 3 Fed. Rules Decisions 300, also decided by the United States District Court for the Eastern District of Pennsylvania. It was because that decision failed to work out a practical rule by which the Courts could uniformly apply Rules of Discovery that the District Court decided to sit *en banc* in this case and work out a new rule which would be in keeping with the spirit and the letter of the Federal Rules of Civil Procedure. It is significant to note that the very Court which rendered the *Stark* decision modified that decision to the extent set forth in the case at bar. In so doing, the Court set up a rule which would carry into effect the full intention of the draftsmen of the rules and which would result in complete uniformity of operation of the rules. That the decision of the District Court is a tremendous step forward in the development of the truth and in the interest of justice can hardly be seriously denied. The Advisory Committee would now have this Court go backward and change the rule to the point where a lawsuit is a battle of wits between counsel and the parties. In this respect, it is worthy of mention that at a symposium held during the Ninth Annual Judicial Conference of the Third Judicial Circuit on June 21st, 1946, this very point was debated before the bench and bar, and one of the chief participants, the former Senator George Wharton Pepper, Vice Chairman of the Advisory Committee on the Federal Rules, made what we consider to be a most shocking statement to the effect that the trial of a lawsuit is like a war and the parties should be left free to fight out their own battles, and, that the decision of the District Court was an "unrealistic" approach to the problem. We respectfully submit that the learned Vice Chairman is living in the far distant past and is completely unmindful of the problems which confront certain litigants, particularly

those not blessed with great wealth. While "might" is "right" on the battlefield, it has never been so considered in a court of law. Defendants, particularly corporate ones and insurance companies, have the facilities and funds necessary to make the most comprehensive investigations. On the other hand, impoverished parties, including those such as widows suing for wrongful death, and manual laborers suing for personal injuries, have neither the facilities nor the funds to conduct a comparable investigation, nor, as a rule, are the avenues of investigation open to the latter as are available to the former. For example, a member of a ship's crew or a railroad worker may become seriously injured, necessitating removal for medical attention. The man has neither the inclination nor the opportunity to conduct any investigation on his own behalf at the time when the witnesses are available and the recollections fresh. It may not be until a substantial period of time has elapsed and until after he has engaged the services of counsel that some inquiry may be made in his behalf. As a rule, by that time, the witnesses are no longer available, if ever they were, to the injured party. On the other hand, immediately upon the happening of an accident, the representatives of a shipowner or their underwriters set about obtaining statements of all of the available witnesses. In the trial of the case it may be assumed that the insurance companies will use only those witnesses who have rendered statements which may be used in opposition to the claim to the exclusion of those witnesses whose testimony may be favorable to the claimant. That this situation can and unquestionably has in the past resulted in miscarriages of justice in innumerable cases is not open to doubt. In death cases particularly, the proposed amendment would result in the greatest harm and injustice. In those situations, with the lips of the decedent sealed for-

ever, the widow and children of the deceased, being without personal knowledge of the occurrence, are very frequently without any information whatsoever concerning the manner in which the death occurred, let alone any of the more intimate details which might have caused it. We think it is safe to say that the inability to prove what actually occurred has in the past resulted in a verdict for the defendant in a tremendous number of cases solely because of a lack of proof and not because the defendant was not negligent or responsible for the death under the law. The learned Vice Chairman of the Advisory Committee asks this Court to go back to that rule and let these parties fight it out unhampered by any rules of Court. We suggest that the parties, on the one hand, the widow and children, and on the other hand, substantial insurance companies and other corporate defendants, are hardly on equal ground, and it was for reasons such as these that the Rules of Discovery were promulgated so that each party, great or small, would receive his just due. Thus equality and justice before the law becomes a reality and privilege and power only another vestigial remnant of jungle law.

It should be noted also that under the proposed amendment corporate defendants and insurance companies would have a tremendous advantage over individuals because under Rule 26 (b) the individuals could be interrogated concerning every matter which might have any possible relevancy to the issues at bar and could ascertain practically without exception the individual's entire case and therefore preclude the possibility of being surprised by any evidence at the time of trial. On the other hand, corporate defendants and others who seek to evade the effect of the Rules, can avoid disclosure of the facts, and at the time of trial, come into Court with a series of surprises without giving the adversary an opportunity to investigate the truth

or substance of any of that surprise evidence. Under the proposed amendment, therefore, there would result a tremendous advantage to corporate defendants and underwriters which, we are certain, was never contemplated by the draftsmen of the rules.

Conclusion

Upon the considerations herein set forth, it is respectfully submitted that the Court below erroneously enlarged the doctrine of privilege and completely misconstrued the true functions of the lawyer. As was stated by the Court of Appeals for the Second Circuit in the *Hoffman* v. *Palmer* case, in the judicial ascertainment of the facts, the public interest in such ascertainment is paramount, and as Wigmore stated, the doctrine of privilege is an obstacle to the investigation of the truth, and as such, it should be strictly confined within the narrowest possible limits consistent with the logic of its principle. Where third parties are concerned, the very heart of the principle involved in the doctrine of privilege would preclude its application to communications made by third parties. The decision of the Court of Appeals should, therefore, be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

No. 885. 47

October Term, 1945.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,

Petitioner.

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

S. B. Fortenbaugh, Jr.,
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Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTIONAL QUESTION PRESENTED.

Does a Writ of Certiorari to the United States Supreme Court lie from any interlocutory decree of a Circuit Court dismissing all punitive and remedial contempt orders imposed by a District Court in a procedural controversy prior to trial on the merits?

ARGUMENT.

The Petitioner presents nothing new or immediate. He states the question and makes an appealing speech about freedom and justice with which there is no disagreement in principle. He forgets that his petition must establish jurisdiction and the necessity for immediate appellate review. His averments of lack of uniformity between Circuits and large public interest are unsupported.

The District Court had jurisdiction in its discretion prior to trial upon the merits, to order both remedial and punitive contempt. The Circuit Court had jurisdiction because the District Court issued a final punitive criminal contempt order, and, on appeal, the Circuit Court necessarily considered the remedial order involving the extent of discovery under the Federal Rules of Civil Procedure. There is now, however, no punitive order from which any appeal, writ of error or petition for certiorari lies and until the case is tried on its merits in the District Court, the question sought to be reviewed is moot. *St. Pierre v. U. S.*, 319 U. S. 41 (1943); *Doyle v. London Guarantee & Accident Co., Ltd.*, 204 U. S. 599 (1907).

Union Tool Company v. Wilson, 259 U. S. 107 (1922), is distinguished from the within case because the Circuit Court concurred in part in a final punitive criminal contempt order and directed the District Court to impose punishment on a corporate defendant previously purged of contempt; the question in the Supreme Court on certiorari was whether the Circuit Court had jurisdiction so to order. The Supreme Court held that it could and would consider the remedial part of the order simultaneously, although it could not have done so except for its joinder with the punitive order under review. On page 110, the Court said:

> "If the company (defendant and petitioner) had acquiesced in the judgment entered, Wilson, (plaintiff) having no right to initiate a review of the punitive part, could not have instituted any appellate proceeding until after final decree" (Parentheses supplied).

It is true that the Petitioner herein has sought and been denied an alleged procedural remedy to assist him in the trying of his case on the merits. But the Supreme Court cannot stop its more important work each time an interlocutory order is entered. If the District Court had not entered a punitive order of criminal contempt, the Circuit Court would have had no jurisdiction to review on plaintiff's appeal. (See *Wingert v. Kieffer et al.*, 29 F. 2d 59 (C. C. A. 4) (1928). Similarly, the defendant would have been barred from appeal to the Circuit Court from a contempt decree involving no final criminal consequences. It follows that the Petitioner herein is barred when the Circuit Court eliminates all contempt, including the punitive. *United States Ex Rel. West Virginia-Pittsburgh Coal Co. v. Bittner et al.*, 11 F. 2d 97 (1926).

Counsel for the Petitioner avers without supporting circumstances or parallel precedent that this cause is "novel and important." The extent of discovery under the new Federal Rules of Civil Procedure is of vital importance to society and economy, but it is not definitive in this cause. Counsel for the Petitioner makes no claim that the decision of this discovery question will determine the litigation and avoid further trial action. He cannot aver that the decision herein will affect a number of other cases and litigants. He is at best only concerned with his self-help in a minor procedural matter.

All of the factual queries of the Petitioner have been answered. He has been given the length and thickness and direction of the hawser—now he wants to "pick lint" among the work product of opposing counsel. The defendants in the litigation have themselves deposed, answered and produced with respect to every detail. Petitioner wants more; he attempts before trial to open opposing counsel's files to prove the latter's clients are untruthful. He decries "the sporting theory of justice", while himself pursuing every trick to confuse trial on the facts and merits.

Petitioner avers as usual that there is conflict between the various Circuit Courts. There is quotable dicta in *Hoffman v. Palmer*, 129 F. 2d 976 (C. C. A. 2) (1942), but the decision therein constitutes a denial of the importance of production of documentary evidence from an attorney's file. The Circuit Court asserts the desirability of free discovery, but does not reverse the District Court, although there was no production upon trial and no objection to production on the ground of privilege. The dicta in the *Hoffman* case to the effect that production on trial bears analogy to production before trial under Rule 26 (b) is not disputed herein.

WHEREFORE, it is respectfully submitted that there is no present punitive or final contempt order of the Courts below subject to appellate jurisdiction, that there is no reason of urgency or general importance or novelty which requires the invocation of the general discretionary power of this Court, and finally that there is no conflict between the decisions of lower Federal Courts necessary for resolution, and that the petition should be denied.

S. B. FORTENBAUGH, JR.,
B. F. STAHL, JR.,
SHIELDS, CLARK, BROWN & MCCOWAN,
Counsel for Respondents.

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and
BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

SAMUEL B. FORTENBAUGH, JR.,
BENJAMIN F. STAHL, JR.,
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IN THE

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OCTOBER TERM, 1946.

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED,
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v.

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AND

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS.

QUESTION PRESENTED.

When all objective facts have been furnished in answers to interrogatories under the Federal Rules of Civil Procedure, will it promote the administration of justice to require pre-trial production of statements or memoranda or recollections developed by counsel in the course of preparation for litigation?

STATEMENT OF THE CASE.

This case is before the United States Supreme Court to review the reversal by the Circuit Court of Appeals for the Third Circuit of a contempt order entered against two respondents and their counsel by reason of their refusal to answer interrogatories requiring them to produce written statements and memoranda prepared by counsel and further to record the work of counsel, all arising out of anticipation and defense of the within litigation.

Originally the five judges of the United States District Court for the Eastern District of Pennsylvania sat *en banc* to consider the prayer of the petitioner that an order be entered upon the said refusal of the two respondents and their counsel, and their unanimous opinion interpreted Rules 33 and 34 of the Federal Rules of Civil Procedure to require the production demanded. The respondents and counsel persevering in their refusal, an order of criminal contempt was entered by the District Court on September 5, 1945, sentencing the three to the Philadelphia County Prison until they should purge themselves.

An appeal was taken to the Circuit Court of Appeals for the Third Circuit and, argument having been had, first before three judges and later before the five judges of the Third Circuit joined by Judge Stephens of the Ninth Circuit, the order of the District Court was reversed. The Circuit Court, through Judge Goodrich, held that Rule 26 of the Federal Rules of Civil Procedure was alone applicable under the circumstances, but that the new obligations of the Rules created a new extended privilege which justified the respondents in their refusal to produce the "work product" of an attorney. Petition for certiorari was filed, denied and finally granted upon reconsideration.

The facts of the accident which is the basis of this litigation may be simply stated, since the merits are not presently involved:—

The Tug "J. M. Taylor" sank on February 7, 1943 with the loss of five lives while engaged in towing a carfloat of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. On February 10, 1943 the respondent-attorney, Samuel B. Fortenbaugh, Jr., was employed by the tug owners and underwriters to undertake potential litigation, both to defend against the legal representatives of the deceased crew and to sue the Baltimore & Ohio Railroad. On March 4, 1943 a public statutory hearing was held before the United States Steamboat Inspectors, at which the four survivors were examined. This record is a public document and has been made available to the petitioner herein. Aside from the within litigation, various claimants have appeared with counsel and in each instance the claims have been disposed of without suit; the tug owners and underwriters eventually determined to withhold immediate suit against the Baltimore & Ohio Railroad.

On April 2, 1943 counsel received a letter of demand from Louis F. McCabe, Esq., then representing the Estate of Norman E. Hickman. On November 26, 1943 the within civil action was filed by Freedman & Goldstein, Esqs., successor attorneys for the Estate of Norman E. Hickman, joining as defendants John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Baltimore & Ohio Railroad Co. Interrogatories were filed by the petitioner on November 27, 1944 and supplemental interrogatories on January 15, 1945.

The respondents answered the original complaint in 1943, thirty-nine detailed interrogatories in 1944, and the many sub-divided supplemental interrogatories in 1945. The respondents have voluntarily produced all information and data secured by the owners and underwriters in the course of business and investigation, including the survey report made upon the raising and drydocking of the Tug "J. M. Taylor", but excepting data, including the statements of the four survivors, prepared by counsel in the course of preparation for litigation.

Respondents have supplied the petitioner with all of the objective facts of the accident, including the names and addresses of all of the members of the crew of the tug. The respondents have given the condition of the tide, the direction of the wind, the size of the hawser, etc., etc., and have answered all of the detailed questions of fact that the imagination of the petitioner's counsel could devise. (See the sixteen printed pages of the Record, pp. 20-a to 35-a.)

The respondents and counsel have not produced the statements demanded in Interrogatory No. 38, which reads as follows:—

> "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the carfloat and the sinking of the Tug 'J. M. Taylor'. Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports".

The petitioner has obtained all the objective facts relating to the accident. The respondents and counsel having persisted in their refusal to supply the form and arrangement of those facts as prepared by counsel in the course of litigation, an order was entered by the District Court as follows:— (Italics ours.)

> "ORDER.
>
> And Now, to wit, this 5th day of September, 1945, this case having come before the Court upon Defendant's exceptions to the 38th interrogatory and supplementary interrogatories propounded by Plaintiff, argument having been had before the Court en banc, and the Court having filed its written opinion requiring Defendants to answer Plaintiff's interrogatory and to produce certain statements and documents in connection therewith *under Rules 33 and 34 of Civil Pro-*

cedure for the District Courts of the United States, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, shall forthwith answer Plaintiff's 38th interrogatory and supplementary interrogatories; *produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel* and agent for Defendants; *state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda* containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.

/s/ KIRKPATRICK,
U. S. D. J."

ARGUMENT.

Introduction.

There is no conflict in aims between the parties. We are all seeking what has been aptly described as "the efficient functioning of the judicial process". We are agreed that the Federal Rules of Civil Procedure have been a forward step in the simplification and expedition of practice and trial and particularly in the clarification of issues before trial.

Despite a few non-conformists, both among the practitioners and the bench, it is not now sufficient to object that examination under Rules 26, 33 and 34 is fishing or utilizing the diligence of the opponent, or that the information sought is inadmissible upon trial or is already known or available to the interrogator. The sporting theory of trial is no longer condoned, and we all desire to obtain justice with all the means consistent with expedition and efficiency. As is very usual, however, agreement in principle on the goal does not assure agreement as to the means of accomplishment.

It will be argued to your Honors that the respondents herein are stooges for the vested interests, wealthy corporations and underwriters. There will be much demagogic name-calling under the banner of alleged freedom of inquiry. Counsel respectfully submits that we are not here arguing aims but ways and means of accomplishing the same objectives. It may seem appealing to appear to ask only that all facts be made free for the judgment of the court; but even freedom of speech is conditioned; there are postal laws, pure food and drug acts, and libel laws, to name only a few.

The argument herein should not be colored by any spurious claim that this is a hardship case where the petitioner cannot prepare his claim and must not be surprised on trial. There were sixteen printed pages of detailed facts voluntarily supplied to the petitioner. There is only one

unanswered question, Interrogatory No. 38, calling for revelation of subjective treatment of the objective facts. The petitioner has never attempted to establish any prejudice to his case by the within withholding.

POINT I.

Federal Rules of Civil Procedure 26, 33 and 34 Do Not Presently Require Production of Writing Developed by an Attorney in Anticipation of Litigation.

It is not intended to urge a legalistic interpretation of the Federal Rules. It has been recognized by the Advisory Committee that there are distinctions in purpose and language between Rules 26, 33 and 34. As the Rules now read, they do not require the respondents to answer Interrogatory No. 38 and there is no ambiguity to be translated away.

Rule 26 is entitled "Depositions Pending Action" and the subsequent complementary Rules 28, 29 and 30 prescribe a procedure of examination and cross-examination by deposition, either orally or in writing before a notary public following notice. It is specifically provided in Rule 26-(a), "Depositions shall be taken only in accordance with these rules". Under Rule 26-(b), the scope of "deposition upon written interrogatories" is limited to any matter, not privileged, which is relevant to the subject matter involved in the pending action. Depositions upon written interrogatories are distinct in procedure and practice from the interrogatories to adverse parties under Rule 33.

Rule 33 provides that interrogatories may be served only "upon any adverse party", without any statement as to the scope thereof, except that "objections to any interrogatories may be presented to the court within ten days after service thereof, . . ." Counsel is not subject to Rule 33, and there is no requirement of any production of any nature, whether the document be original or copy.

Rule 34, entitled "Discovery and Production of Documents and Things for Inspection, Copying, or Photographing", sets up four requirements as follows:—

(1) "upon motion of any party showing good cause therefor"

(2) "any designated documents"

(3) "not privileged"

(4) "which constitute or contain evidence material to any matter involved in the action".

Accordingly, under the Federal Rules as they are, there is no authority for requiring, by simple interrogatory, the production of statements and memoranda made by counsel. The moving party here did not make any attempt to prove hardship or show any good cause for his motion as required under Rule 34. Counsel is not even subject to interrogation under Rule 33 which says nothing about producing anything. The petitioner did not proceed by deposition as provided in Rule 26, which would have permitted cross-examination under specified conditions. The further protection of "extended privilege" is applicable to all discovery under Rules 26, 33 and 34, as considered hereafter.

This same attempt to avoid the requirements of Rule 34 by assertion of procedure under Rule 33, although production of writing was demanded, was halted in *Gordon v. Pennsylvania R. Co.*, D. C., E. D. Pa., 9 Fed. Rules Serv. 34.13, Case 1, decided August 15, 1946. Therein District Court Judge Kalodner (now Circuit Court Judge) denied production because there was no showing of necessity, designation or materiality. In fact Judge Kalodner shows little sympathy with or approval of the District Court's opinion in this case, although he concurred therein.

In the District Court opinion, the question was raised whether the procedure was under Rule 33 or 34, and the order to produce and the contempt order, both dated September 5, 1945, specifically provide that the alleged failure lies under Rules 33 and 34. Until Judge Goodrich's opinion, it was never considered that the interrogation herein was under Rule 26, which is limited to depositions. Reference to that rule by counsel had been made in the

course of argument only for guidance in construing the scope of the examination and production required under Rule 34.

The amendments proposed in June, 1946 by the Advisory Committee on Rules of Civil Procedure propose to correlate and make uniform the scope of inquiry permitted under Rules 26, 33 and 34 and to extend the same protection to all parties examined, by cross-reference to an enlarged Rule 30. These proposals do not eliminate the necessity of choosing the appropriate discovery method and do not change the peculiar applicability of each rule to depositions, written interrogatories and production, respectively. It is significant that the proposed new Rule 34 still commences with the words "Upon motion of any party showing good cause therefor". In this case there has admittedly been no establishment of any hardship requiring production. Petitioner has made demand for the answer to Interrogatory No. 38 as a matter of right, requiring no justification.

POINT II.

Limiting the Scope of Discovery to Objective Facts Protects the Interrogator From Hardship and Preserves the Benefits of Trial by Jury.

Admitted that surprise as to issues and facts should be eliminated.

Denied that this petitioner does not possess all the facts.

Submitted that litigation should remain a proving ground for truth and not a literary contest, in which the jury passes on the merits of counsel's writings.

In the length and breadth of the petitioner's brief there is no reference to the pages of answers and testimony which have already been taken relating to the objective facts of the accident. The petitioner's plea is a generalized sob that it is unfair to withhold any of the facts. There is no

acknowledgment that all of the facts have been presented by full answers to other interrogatories than No. 38.

Not only does the petitioner's brief demand facts when he has all the facts, but he nowhere attempts to define what he means by "facts". Apparently petitioner concedes no limitation whatsoever on the scope of his examination, outside of strict historical privilege, and he sets himself up as the sole judge as to whether and how extensively he shall interrogate. He recognizes no duty to show cause and inveighs against the proposed amendment of the Advisory Committee which would put on him only the burden of satisfying the court that he is unfairly prejudiced by any withholding.

Admittedly, "facts" is an elastic word depending on the circumstances. But petitioner contends, in effect, that it comprises everything conceivable by the ingenuity of adverse counsel. It is respondents' position that facts are "what happened"; they may also include those events which preceded or followed the occurrence in order that the proper appreciation, analysis, and perspective can be applied. The writings of counsel recording the event are not within any definition.

It should not be necessary to use the term "objective facts" as respondents have done hereinbefore. This is done for the purpose of emphasizing a distinction not even recognized by the petitioner. Respondents admit the petitioner should be informed as to what happened, i. e., possess the facts which are at issue to expedite trial. Others can invent other terms to cover the facts subject to development by interrogation—"primary facts", "first degree facts", or what have you—but there must be a practical limit to psychoanalysis of incidental writing by counsel with a weak case.

Despite his plea for facts, counsel for the petitioner really wants to examine the form in which the facts were reduced to writing by opposing counsel. He wants to confuse the statement-givers on cross-examination, not as to

the validity of the facts, but as to possible different methods of stating those facts.

Counsel for the petitioner has various means at his disposal to ascertain and check the objective facts as such, and particularly those contained in the statments taken by counsel from the four survivors. He knows the identity and addresses of the individuals who are available locally. He can call them for pre-trial examination or can take their depositions by oral examination or written interrogatories. Counsel for the petitioner has already had available to him the record of the public hearing at which the four survivors testified. The only possible purpose of wanting the statements made by counsel for the defense is to twist phrases out of context and confuse the witnesses by questioning language used by defense counsel in recording the witnesses' reports.

It may be that counsel for the petitioner is advocating a dilution or elimination of the American system of trial by jury which requires the personal appearance of witnesses under oath subject to cross-examination. Every trial lawyer knows the salutary effect of the dignity of court proceedings upon a witness, and there is no question but that the give and take of the court room enables the jury to weigh the facts. Depositions are a sometime necessary method of obtaining and presenting evidence not otherwise available. Plaintiff here has not even used the deposition process with its give and take. But we should not substitute statements and counter-statements and everlasting cross-examination based on hearsay, in lieu of an examination directed to fact finding. Examining secondary sources is no substitute for fact evaluation and will not only lengthen but entirely pervert, the benefits of the American jury system.

It is one thing to agree that the sporting theory of justice should be eliminated, but the trial should still remain an adversary proceeding designed to bring out the truth by examination and cross-examination in open court.

We seek the truth in objective facts and not an examination of the "package" in which the same may be wrapped in the course of the investigation, whether by counsel or any agent, in the anticipation or preparation for litigation. When the interrogator has all the objective facts and the means of development by deposition and interrogation, it is no hardship to refuse him secondary writings and refer him to his day in court.

POINT III.

Extension of the Scope of Examination Beyond Objective Facts Is Worse Than Inconsequence Because It Creates Diversion of the Issue, Insures Uneven or Arbitrary Judicial Discretion and Breeds Conflicting Interests.

Freedom requires order. That is true whether you are concerned with freedom of speech or religion or discovery under the Rules of Civil Procedure. The unlimited rule of discovery urged by the petitioner can result only in chaos when judged by the agreed goal of promotion of efficient administration of the judicial process.

The chaos existing needs no further documentation. Moreover, the use of discovery under the new rules is still relatively unknown and the present difficulties and delays will multiply in geometric progression. Judge Goodrich has thoroughly annotated the progressive lack of uniformity and uncertainty. The June 1946 Report of the Advisory Committee collects all the decided cases (See Note re Rule 30-(b), pp. 40-46) and summarizes with understatement, "The district courts have been in disagreement over the extent to which such an inquiry may be made". There is no dispute that the federal courts in their orders under Rules 26, 33 and 34 have varied between Circuits and within Circuits, within Districts and from week to week within the self-same court.

In *Condry v. Buckeye S. S. Co.*, D. C., W. D. Pa., 4 F. R. D. 310 (1945) the District Court for the Western District of Pennsylvania, in circumstances very identical, re-

fused to order the production of memoranda or photographs by counsel. Distinguishing the Circuit Court's decision in *Hickman v. Taylor*, 153 F. (2d) 212, two District Judges of the Third Circuit reach opposite conclusions. Judge Kirkpatrick in *Shields v. Sobelman*, 64 F. Supp. 619, (1916) ordered the production of photographs taken by direction of counsel, but Judge Kalodner in *Gordon v. Pennsylvania R. Co.*, supra, denied production of statements taken by defendants, including a statement of the plaintiff himself. In *Piorkowski v. Socony Vacuum Oil Co.*, D. C., M. D. Pa., 1 F. R. D. 407 (1940), Judge Watson held that a liberal examination and discovery does not mean that one litigant can make use of his opponent's preparation of his case. Judge Kirkpatrick in *Stark v. American Dredging Co.*, D. C., E. D. Pa., 3 F. R. D. 300 (1943), refused to order the production of certain statements not taken by counsel. In February, 1945, Judge Ganey in *Schenley Import Corporation v. S. S. "S. Thome"*, D. C., E. D. Pa., No. 47 of 1944 in Admiralty (not reported) refused counsel for the within defendants the right to obtain a survey report.

A most striking illustration of uncertainty as to the proper scope of discovery is to be found in the decisions of Judge Moscowitz of the Eastern District of New York. In *McCarthy v. Palmer, et al.*, 29 F. Supp. 585, Judge Moscowitz denied the examination of affidavits and similar materials secured by independent investigation incident to the preparation of the case for trial. This decision was logically followed by *Olson v. New York Central R. Co.*, D. C., E. D. N. Y., 31 F. Supp. 745, (1940), in which Judge Moscowitz refused to require production of statements taken from employees of the other party before the commencement of the action. Good cause was again made the test of permissible scope in *Creden et al. v. Central R. Co. of New Jersey*, D. C., E. D. N. Y., 1 F. R. D. 168 (1940), the Court saying, "In absence of any showing why plaintiffs cannot secure this information from the witnesses themselves by deposition or otherwise, there is no reason to

permit plaintiffs to avail themselves of defendant's preparation of its case". The same denial was made by the same judge in *Gitto, et al., v. "Italia", Societa Anonima Di Navigazione, Genova,* D. C., E. D. N. Y., 31 F. Supp. 567, (1940), and in *Stern v. Exposition Greyhound, Inc.,* D. C., E. D. N. Y., 1 F. R. D. 696 (1941). But subsequently in *Dugger v. Baltimore & Ohio Railroad Co.,* D. C., E. D. N. Y., 5 F. R. D. 334, (Adv. Rep.) (1946), an opposite result is reached. Judge Moscowitz ruled, "There is no privilege attached because the statements were taken by the attorney for the defendant or some one in his behalf. The matter of privilege was discussed by the district court sitting en banc in the case of *Hickman v. Taylor,* 4 F. R. D. 479. That case was reversed by the Circuit Court of Appeals, Third Circuit, 153 F. 2d 212. It is clear that the ruling of the district court in *Hickman v. Taylor, supra,* is more in line with the policy of the Second Circuit".

See also:—*Bowles v. Ackerman et al.,* D. C., S. D. N. Y., 4 F. R. D. 260; *Walling v. Richmond Screw Anchor Co, Inc.,* D. C., E. D. N. Y., 4 F. R. D. 265. (These cases limit production to evidence secured by the adverse party upon which the party would rely at a trial.); *Condry v. Buckeye S. S. Co., supra,* (Documents were not evidence); *Sonken-Galamba Corporation et al., v. Atchison T. & S. F. Ry. Co., et al.,* D. C., W. D. Mo., 30 F. Supp. 936, (Required designation of documents and showing of materiality); *Kenealy v Texas Co.,* D. C., S. D. N. Y., 29 F. Supp. 502; *Fluxgold v. United States Lines Co.,* D. C., S. D. N. Y., 29 F. Supp. 506. (Both cases hold that the statements of witnesses demanded did not constitute evidence); *Creden v. Central R. Co. of New Jersey, supra,* (Production refused because adverse party could get statements from witnesses himself); *Poppino v. Jones Store Co.,* D. C., W. D. Mo., 1 F. R. D. 215, (Cannot compel production of evidence to be used by adversary); *United States v. Aluminum Co. of America, et al.,* D. C., S. D. N. Y., 1 F. R. D. 57, (Documents must be evidence and material or probably material,

not for refreshing recollection or as clues to evidence); *Seals v. Capital Transit Co.*, D. C., Dist. of Columbia, 1 F. R. D. 133, (No good cause shown); *Courteau v. Interlake S. S. Co., et al.*, D. C., W. D. Mich., N. D., 1 F. R. D. 525, (No showing of probable materiality); *United States v National City Bank of New York, et al.*, D. C., S. D. N. Y., 2 F. R. D. 46, (Must show relevancy and materiality); *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.*, D. C., Md., 30 F. Supp. 275, (More than fifteen or twenty interrogatories are burdensome).

It is history that well-intentioned lack of uniformity has created chaos because there are no standards to apply where you allow unlimited examination. If a uniformity of action had resulted from application of the discovery rules, the argument here could be limited to the rightness of the construction. As it has developed, there is no precedent citing which is helpful for the next case. All of the courts have agreed that the rules generally are forward-looking and have expedited trial in simplifying the issues. But when it comes to the discovery provisions, the courts have been riding off in all directions.

Recognizing the difficulties of mathematical standards, it is still possible to develop an elastic formula which will at least designate the interrogator as the burdened party and the measure of proof of hardship to be produced by him. Without some amendment or change as hereafter discussed, there will be chaos or inflexible discretion; probably the latter will be the end result, which also is to be avoided. The District Court Judges of the Eastern District of Pennsylvania, following the decision herein and before the Circuit Court opinion, simply refused to allow any objection to interrogation; there was no time for the application of discretion.

It has already been noted under Point II of this brief that petitioner can have no other purpose than diversion in his interrogation since he has all the facts. All trial lawyers are familiar with the possibilities of taking the

witnesses and jury down the by-ways of immateriality. Don't let the trial become a contest of the literary styles of opposing counsel.

In previous arguments, counsel has urged that unlimited scope has burdened and will cumulatively place an intolerable burden on the courts. This is an empirical argument which we do not like to make because the federal courts have always been eager to assume any burden which would assist in achieving justice. But, if there is no appealing argument based on the size of the burden on the courts, nor even in the practical inflexibility which has frequently arisen to overcome the burden, it remains unanswerable that the burden need not be created and the burden is not practicably resolvable by any discretion, however well-intentioned and cheerfully assumed.

This burden on the courts cannot be shrugged off by agreement in principle on the benefits of perfect application of general discovery rules. Undoubtedly the burden has varied between circuits, but equally it is increasing. Every single case in the District Court for the Eastern District of Pennsylvania is now a forum for extended interrogation and frequently the Judges have to consider objections to every single question, which require not only examination of the issues and evidence, but all the possible hearsay. We have no quarrel with the holding per se that interrogation goes beyond admissible evidence, but it does enlarge the burden on objections by enlarging the scope of inquiry. Possibly also, admissibility in trial will be enlarged, although this is a result the petitioner would strenuously oppose. See *Edison Electric Co. v. U. S. Electric Lighting Co.*, 45 Fed. 55, 59.

We need not go beyond this case to see the possibilities. A year and ten months after the happening of the accident, and a year after the suit was filed, counsel for the petitioner filed thirty-nine interrogatories with sub-divisions. Thereafter, he filed supplemental interrogatories, again with sub-divisions. Similar detailed questions were

served on the Baltimore & Ohio Railroad Company. To date the co-defendants have not served interrogatories on one another, and respondents' interrogatories upon petitioner are being held in abeyance pending the decision herein.

It has been generally conceded in argument herein that, if interrogatories are to embrace the attorney's files and his work generally, then it is inevitable that in each case the attorney will be a witness. Petitioner has wrongly belittled the frequency with which this will occur, but wherever there is a limit of effective discrediting through the use of these statements, opposing counsel will have to take the stand. Certainly if witnesses are to be cross-examined on the basis of writings developed and produced by the attorney, then the attorney will be allowed the opportunity to explain the circumstances and interpret and develop the facts in his possession. The opinion of Judge Goodrich predicts the undesirable consequences of this procedure.

Under the decision of the District Court herein, counsel planned to serve interrogatories on adverse counsel the first Monday of each month to get a progress report. How else be sure that opposing counsel has not done some more writing? It is doubtful if this would have been helpful toward expedition or simplification. It might be helpful to take a memory course to avoid any writings, although the District Court attempts to prevent even this.

Recognizing that the members of the bar will adapt themselves to any new rules, however revolutionary, and recognizing that the profit motive is not the number one factor with an attorney it should still be remembered that our common law system has worked successfully for hundreds of years. It cannot be ignored (1) that attorneys are officers of the court, superior in training and subject to discipline, and (2) that they are the employees of private clients and should not be subject to conflicting loyalties as between client and adverse parties. In an ideal world where abstract justice would be a matter of routine, this argu-

ment would be unnecessary. It certainly is not appealing to ask this Court to be realistic in remembering that attorneys are the paid employees of private clients. We will be the first to urge upon the Court that attorneys are officers of the court sworn to uphold the principles of justice, because that is one reason why attorneys as a class should be "privileged".

It does not change the fact, however, that any decision requiring "writing" production by the attorney will create a conflict of interest because the law in this country has been built around an entirely different concept of the duties of an attorney. All attorneys are immediately conscious of the necessity of never representing conflicting interests. If there is any possibility that such a conflict may develop, attorneys scrupulously avoid the chance of being on both sides because of the recognized difficulty of then being disinterested. Under any unlimited rule, every case presents the possibility of the attorney being both advocate and witness; every writing taken or witness interviewed may force the attorney to testify for or against his client. This will create a deadening influence to prevent any investigation looking toward understanding and possible settlement. Attorneys have a duty to be active and not to remain passive because it may create conflicts and harm their clients.

In this bright new world of discovery, it is both possible and practical to preserve complete inquiry and competitive attorneys, but, again, it is submitted that this requires a rule of order to allow litigants full investigation without fear that efforts will be misconstrued and attention diverted into literary by-ways.

POINT IV.

The Discovery Rules Should be Construed Uniformly and Amended, if Necessary, to Exempt Data Developed in Anticipation of Litigation, Particularly by Counsel.

The English have a rule for it and the Advisory Committee has proposed amendments to assure it, i. e., protec-

tion from discovery of writings prepared in anticipation of litigation. Thereunder the writings so developed, whether by the parties, their agents or counsel, are not subject to production, except in hardship cases where "the burden (is placed) on the person seeking the discovery of the writing to demonstrate the necessity therefor". (Report of Advisory Committee, p. 46.) The decision of the Third Circuit Court herein represents a limitation on recognized safeguards rather than new prohibitions.

It is customary to refer to the English administration of justice as incorruptible, fair and expeditious. However uncritical such comment, it is significant that the English Judicature Act of 1873, as amended, was the precursor of our own Rules and thereunder there has been extended even larger protection to data developed in anticipation of litigation than now proposed in the amendments of the Advisory Committee. English Rules Nos. 1 and 14 of General Order 31, entitled "Discovery and Inspection", read as follows:—

> "*Rule 1—Discovery by Interrogatories.* In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties; or any one or more such parties . . . Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. (R. S. C. Nov. 1893, as amended 1917)".

> "*Rule 14—Order for Production of Documents.* It shall be lawful for the Court or a Judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the Court or Judge shall think right; and the Court may

deal with such documents, when produced, in such manner as shall appear just".

The English Rules make production a matter for court discretion at any time in any matter, but that discretion is never exercised to allow inquiry into the solicitor's records. Our Rule 34 provides that the moving party shall (1) show good cause to produce (2) any designated documents . . . or tangible things (3) not privileged (4) which shall contain material evidence. These four conditions precedent are absent from the language of the English Rule 14, but the English courts would be shocked at the decision of the lower Court herein. The English rule is construed to protect the interest of the client in the development of his case so long as litigation is contemplated or pending, and is directly contrary to the decision of the lower Court herein.

The English cases recognize two types of "privilege", although that term is not incorporated in the language of the rule itself as it is in our Rules. First, all communications between solicitor and client are privileged to be free from production at all times and under all circumstances; second, where litigation is contemplated or pending, any document, regardless of source and by whomsoever prepared, is likewise protected, whether there is any communication between client and solicitor or not. The English courts recognize the benefit to the good working of the judicial system by protecting the client to an absolute extent, unlimited by whether the work and effort are done by the solicitor or his agent or by the client or his agent, relating to third persons or anybody, so long as litigation is contemplated or pending and the work is connected therewith.

In other words, the English courts are cloaked with "discretion" alone and yet administer a practical system of extending "privilege" in matters of discovery to all the work product of the solicitor engaged in litigation.

The present scope of such discovery is well summarized in the following quotations from Page 500 of "THE YEARLY PRACTICE OF THE (English) SUPREME COURT FOR 1938":—

> "Communications between a solicitor and a non-professional agent or a third party, directly, or through an agent, which come into existence after litigation is contemplated or commenced and made with a view to such litigation, either for the purpose of obtaining or giving advice as to it, or of obtaining or collecting evidence to be used in it, or which may lead to the obtaining of such evidence, are privileged".
>
> "Documents obtained by a solicitor with a view to enabling him to prosecute or defend an action, or give advice with reference to existing or contemplated litigation, are privileged".
>
> "Documents prepared confidentially after a dispute has arisen between the plaintiff and the defendant and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to an action, are privileged".

The June 1946 discovery rule amendments proposed by the Advisory Committee would be decisive in this case to relieve the respondents. They are a compromise attacked by the extremists on both sides. Opposing counsel herein states in his brief that such amendments are outrageously restrictive in putting him under any burden. Undoubtedly the moving attorney, under the proposed amendments, could not meet his burden by unsupported generalities as to his own deficiencies, but it is not too much and may be too little to require him to "satisfy" the court as to his prejudice through non-production of writings. There has also been criticism of the proposed amendments on the ground that they retain all the faults potential in the present Rules in continuing discretion in the courts to order answer without sufficiently definite standards. As usual, we find one side

wanting no rule of limitation, the other demanding an absolute ban on discovery, and neither side considering that the amendments are limited to "writings".

Your Advisory Committee composed its amendments following the *Hickman* decision in order to meet the problems and issues there raised. The intention of the Advisory Committee was to limit discovery so far as "writings" were concerned while disapproving some of the reasoning of the decision of the Circuit Court herein. We have the report of the Vice-Chairman as authority for the intention of the Advisory Committee to limit discovery,—(5 F. R. D. 406).

> ". . . It was the general sense of the Committee that wherever the statement, whether in oral or written form, embodies what is aptly called in the Hickman case the 'work product of the lawyer,' that that should be immune from the processes of discovery; and you will notice that it is provided in the amendment which has been distributed to you that that shall under no circumstances be made the subject of discovery."
>
> ". . . In the case of the amendment 30 (b) the proposal now is to provide that statements of fact witnesses shall not under ordinary circumstances be within the scope of discovery, but the element of discretion is left to the court to compel their production if in the judgment of the court there would be a failure of justice if they were not to be produced; as, for example, where it would then become impossible for a plaintiff to formulate his case or a defendant to prepare his defense."
>
> ". . . The lawyer's function as it issues in his work product is, under the proposed amendment, absolutely immune."

It has been the position of counsel from the inception of the question herein that the courts had ample power to limit interrogation and protect client and counsel from inquisition, without any amendment of the Rules of Civil Pro-

cedure. Rule 30 (b) gives the courts power "to make an order . . . that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters; . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression". It would thus appear that the power to limit has always resided in the trial courts and the requirement for amendments is not for change but for definition by standards. Because there has been so much diverse application, it is time for restatement.

The Procedural Rules Committee of the Supreme Court of Pennsylvania has reached the same conclusion that discovery must be limited as evidenced by its proposal of Rule 4007, reading as follows:—

> "Rule 4007. Limitation of the Scope of Deposition, Examination or Inspection.
>
> A deposition, examination or inspection shall not be directed to the securing, from a party or the insurer of a party, or the attorney or agent of either of them, of information obtained in preparation for the pleading or proof of a claim or defense".

To this point, counsel has not even referred to the "work product" of an attorney, or to the theory of "extended privilege". If the broad argument incorporated by the Advisory Committee, as hereinbefore presented, is accepted, there is no necessity of granting special status to the attorney to prepare his case. The theory of the Circuit Court decision was one developed and pressed by counsel for the respondents from the commencement of this litigation, but only as a final alternative which would be essential if the broader protection were not made available. The anomalous position of the attorney attempting to develop fully his case under the unlimited rule sought by the petitioner herein, only dramatizes the general unworkability of the rule *reductio ad absurdum*. It is history that the privi-

lege granted the attorney-client relationship
the imposition of testimonial compulsion. T
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historical privilege was the empirical result.
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writing in anticipation of litigation.

Conclusion.

It is respectfully submitted that the de
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SHIELDS, CLARK, BROWN &
Counsel for

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Jr.,

& McCown,
for Respondents.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased, *Petitioner*,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, individually, and trading as TAYLOR & ANDERSON TOWING & LIGHTERAGE COMPANY and BALTIMORE & OHIO RAILROAD COMPANY; JOHN M. TAYLOR, GEORGE H. ANDERSON, and SAMUEL B. FORTENBAUGH, JR., *Respondents*.

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT.

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RESPONDENTS' SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT.

At the argument in this case, we advanced the contention that Rules 26, 33, and 34 of the Federal Rules of Civil Procedure were not intended to apply to evidence developed by lawyers in the preparation of cases through interviews with witnesses, whether in the form of writing or recollection. In support of this contention, reference was made to a statement by Mr. Sunderland, noted on page 13 of the brief filed on behalf of the Maritime Law Association to the effect

that the rules with respect to depositions and discovery were intended by the Committee to follow a successful precedent operating in some of the State or British courts. Reference having been made to the absence of any precedent in any American or British court sanctioning the application of discovery and inspection to the circumstances of this case, counsel secured leave of the Court to submit a brief communication setting forth the authorities to which reference had been made.

With respect to the British authorities, the Court is respectfully referred to the supplemental brief filed on behalf of the American Bar Association and to the following quotation from Odgers, *Pleading and Practice* (8th Ed. 1918) p. 285:

> "4. Documents prepared with a view to Litigation—*All documents which are called into existence for the purpose of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production.* (Birmingham, &c., Motor Omnibus Co. v. L. & N. W. Ry., (1913) 3 K. B. 850; Adam Steamship Co. v. London Assurance Corporation, (1914) 3 K.B. 1256.) * * * So are all papers prepared by any agent of the party for the use of his solicitor for the purposes of the action, provided such action be then commenced, or at least imminent. M'Corquodale v. Bell, 1 C.P.D. 471; Southwark and Vauxhall Water Co. v. Quick, 3 Q.B.D. 315.)" [Italics ours]

With respect to the American state and federal decisions, reference is made to the following, supporting the position advanced by us at the argument:

Davenport Co. v. *Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

Cully v. *Northern Pacific Ry. Co.*, 35 Wash. 241, 77 Pac. 202 (1904).

McNamara v. *New York State Rys.*, 129 Misc. 130, 220 N. Y. Supp. 522 (Sup. Ct. 1927).

State ex rel. Mo. Pac. R. Co. v. *Hall*, 325 Mo. 102, 27 S. W. (2d) 1027 (1930).

New York Casualty Co. v. *Superior Court*, 30 Cal. App. (2d) 130, 85 P. (2d) 965 (1938), hearing denied by Calif. Sup. Ct. 1939.
Armstrong v. *Portland Ry. Co.*, 52 Ore. 437, 97 Pac. 715 (1908).
Ex Parte Schoepf, 74 Ohio St. 1, 77 N. E. 276 (1906).
Lehan v. *Chic. & N. W. Ry. Co.*, 169 Wis. 408, 172 N. W. 787 (1919).
Atlantic Coast Line R. Co. v. *Williams*, 21 Ga. App. 453, 94 S. E. 584 (1917).
The Princess Sophia, 269 Fed. 651 (W. D. Wash. 1920).
The President Polk, 37 F. (2d) 102 (E. D. N. Y. 1929).

In all of these decisions the material sought to be obtained was prepared by persons other than counsel. *A fortiori*, a similar result would seem to be required in cases where counsel had developed the matters requested.

To be distinguished are various cases where material was held a proper subject of discovery or inspection either on the ground that it was made "in the regular course of business" by persons other than attorneys or before litigation had actually developed or been threatened [*Virginia-Carolina Chemical Co.* v. *Knight*, 106 Va. 675, 56 S. E. 725 (1907)], or where the material was merely a photograph, as distinguished from verbal communications [*LaCoss* v. *Town of Lebanon*, 78 N. H. 413, 101 Atl. 364 (1917)].

Certain of the above decisions cited in support of our position use the word "privilege" to defend the immunity of statements of witnesses made in anticipation of trial. The decisions in other cases are grounded on other reasons. The purpose of the citations is to show that the American law (apart from the Federal Rules of Civil Procedure) apparently is the same as the British rule and denies the availability of this information to counsel for the opposite side in litigation, at least before the actual trial of the case. The cited authorities also support our contention that the Federal Rules of Civil Procedure should receive the same interpretation as the British rules relating to dis-

covery and inspection, which, notwithstanding their broad and general language, have not been applied to situations such as those presented in this case. (See references to British authorities above noted.)

In this connection reference is again made to the specific provisions of Section 26 (b) of the Rules providing for the disclosure of names and addresses of witnesses and to the absence of any specific requirements for the disclosure of their statements; and to the rule of statutory construction adopted by this Court in the parallel case of *Thompson* v. *Thompson*, 218 U. S. 611 (1910), referred to upon the argument.

Respectfully submitted,

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November 14, 1946.

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Supreme Court of the United States

October Term, 1945. No. 885.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,
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vs.

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and
BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,
Respondents.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C. I. O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C. I. O.

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

SUPREME COURT OF THE UNITED STATES.

October Term, 1945. No. 885.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,

Petitioner,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C. I. O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the United Railroad Workers of America, C. I. O., respectfully represents:

This union has herewith filed this petition for leave to intervene in these proceedings because of the extreme importance and frequency of incidence of the issues raised in this case. Inasmuch as thousands of railroad workers are injured and suits are therefore instituted in United States District Courts for trial, under the Federal Employers Liability Act, 45 U. S. C. A., 51 et seq., and under the various Safety Appliance Acts, 45 U. S. C. A., 1-16 and 23, inclusive, the problem of preparing the case for trial is constantly present.

The federal rules of civil procedure pertaining to discovery admittedly were written with a view toward eliminating the adversary system. They were directed toward facilitating and assuring the ascertainment of all facts pertaining to each case, so that causes of action would be decided not upon mere superiority of opportunity to investigate the factual situation, but upon all of the facts by whomsoever they might have been developed.

In that manner it was hoped that each case would be fairly and squarely tried upon all of the proper and relevant evidence known to all of the parties in advance of trial, eliminating thereby all elements of surprise in the actual trial of the case.

The decision of the District Court in this case, recognizing the true purpose of the rules, held that whether the investigation was made by counsel or persons under him, or by the insurance company through its claim department, the information thus obtained was subject to discovery under the federal rules of discovery.

The so-called "privilege" claimed by counsel can well be-

come a tool to emasculate the rules and to turn them into meaningless words. We believe that the Circuit Court of Appeals, Third District, has by its decision now made it possible for insurance, steamship and railroad companies, and others, to hide behind the alleged cloak of privilege pertaining to counsel, and thus wipe out all gains that have been made up to now in discovery procedure, which had proven so invaluable in arriving at a fair and complete trial in each case.

In point of fact, the instant case is indicative of the intention of insurance carriers and common carriers to use this alleged veil of privilege, arising out of the assignment of counsel as supervisor of investigation, as a means of hiding and suppressing vital information necessary to the proper preparation and presentation of personal injury cases.

In fact, the investigation made on behalf of the injured employee is always made under the direction of his attorney and the alleged privilege would seemingly extend to the plaintiff as well as the defendant. Those who represent employee unions and try these cases, however, do not desire nor covet this protection. They want the cases tried with all of the facts in the case presented to the Court and jury with the chips falling where they may.

We cannot stress too strongly our thoughts upon this subject. Railroad employees, when injured, usually suffer very severe and disabling injuries requiring hospitalization. Very frequently head injuries are sustained that blot out from the memory of the injured all recollection of the manner of the occurrence. While the injured lingers in the hospital for months without friends or kin in the community to assist him in obtaining information, the insurance, steamship and railroad companies immediately round up the witnesses, take statements, learn of obscure facts that have extreme legal significance and otherwise prepare the case in anticipation of a law suit in the future. Such diligence is not criticized. It is our thought, however, that this Court intended all information obtained by anyone from whatso-

ever source relevant to the occurrence, to be available for all parties in the case. Since it is conceded that had this investigation been made under the auspices of the claim department by the various defendants that under the rules it would have been made available to the injured, we believe the presence of counsel should not make any difference.

We respectfully submit that there must not be retrogression in judicial procedure from the advances made under the rules of discovery. We believe the procedural law can be as important as the substantive law. We believe that all of the liberal advances intended by Congress on behalf of railroad employees and seamen, and so strongly interpreted by this Court, can be totally lost and destroyed by the ruling of the Circuit Court in this case. What avail is it to the injured employee to have liberal legislation in his favor if the facts by which he must establish a cause of action thereunder are suppressed by means of this devious privilege claimed?

We feel that this issue is of extraordinary importance. This Court must recognize that before cases can be presented to it upon given facts, that these facts must first be developed by interrogation of witnesses who are not easily found, and whose continued employment by the defendants renders them hostile.

In the days before the federal rules of discovery were enacted, it was a harum-scarum battle between the parties. Witnesses were hidden from the plaintiff, surprise witnesses were pulled out of the hat, with no advance opportunity for the adversary to learn of their identity or to check on the truth of their testimony, or to rebut the same upon such short notice at the trial. We must never return to those days.

The exception created by the decision of the Circuit Court in favor of privilege extending over the "work product" of counsel may have appeared to the Court below as an innocuous and well intended exception. Already we have seen it expand, and soon we shall be able to obtain no in-

formation in advance of trial, as each of the defendants has, or will provide itself with counsel, and the alleged privilege of counsel's "work product" will be used as a protective device, to silence all tongues and suppress all evidence.

Because the opportunity to challenge this rule in this Court probably will never come again, since ordinarily decisions on the rules are of an interlocutory nature, because in each and every case tried in the United States Courts this question must recur, because of the extreme hardship which this decision will inevitably work upon workingmen throughout the Nation, we respectfully submit that we should have some final word from this Court as to the meaning of these rules.

If the creation of these rules were of sufficient importance to warrant the appointment of a committee composed of eminent judges and lawyers throughout the country to bring them into being, with all of the months of study and effort expended on them, it seems to us that their "work product" should be of sufficient importance to warrant this Court devoting time toward considering them, so that litigants in Federal Courts may know just what they mean and what rights are created under them.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C. I. O., Amicus Curiae.

BRIEF AMICUS CURIAE

FILE COPY

OCT 4 1946

In The

Supreme Court of the United States

No. 47 October Term, 1946.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,
Petitioner,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,
Respondents.

BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., AMICI CURIAE ON WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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FACTS

The facts have been set out in full in petitioner's brief; and, therefore, they will not be repeated here.

QUESTION PRESENTED

The only question presented by this case is whether the statements, oral and written, and the facts obtained by an attorney on behalf of his client from third persons not connected with his client are "privileged" and hence exempt from the discovery provisions of the Rules of Civil Procedure.

ARGUMENT

This brief of the United Railroad Workers of America, C.I.O., *amici curiae*, endorses fully the views presented in petitioner's brief. This brief is intended, first, to stress the crucial restrictions which would be imposed upon the rights of hundreds of thousands of railroad workers to recover under the Federal Employers' Liability Act, if the decision of the Circuit Court is sustained; second, it is intended to approve and supplement the legal arguments advanced in petitioner's brief, but to avoid repetition thereof.

1. THE CIRCUIT COURT DECISION SERIOUSLY UNDERMINES THE RIGHTS CONFERRED BY THE FEDERAL EMPLOYERS' LIABILITY ACT.

Thousands of railroad workers are killed or injured annually on the nation's railroads because of the negligence of their employers or fellow servants. If a railroad worker is killed, his family usually knows little or nothing about the facts surrounding his death. Even if he survives, it is scarcely possible that at the time of the accident he will be favorably enough placed and sufficiently astute to record or catalog the events leading to his injury and to seek out witnesses. In many instances, orders, policies or movements leading to or causing his injury emanate from offices of train dispatchers or other employees located many miles from the scene of the accident, and the injured employee cannot, unaided, know or ascertain the source. When the time arrives to institute litigation, his recollection on many circumstances may be hazy. Head injuries may block out from the memory of the injured all recollection of the manner of the occurrence of his injury. Witnesses, even if he recalls them, may have been transferred to other areas, may have died, or may otherwise have become unavailable. Even if they be available, it is a notorious fact that, at least in the past, employees have been discouraged, if not prevented by intimi-

dation, from disclosing evidence of the railroad's negligence. Fear of loss of employment can be an effective restraining force. Indeed, Congress, itself, has taken cognizance of the reality of these deterrents to full disclosure. (See 45 U.S.C.A. 60). An employee witnessing an accident may initially make a candid and full statement to the railroad's investigators. But whether, after deliberation and possible hints or suggestions, he will later make similar unrestrained disclosures, if hurtful to his employer's defense, in favor of the injured employee, is not beyond doubt. Unless the injured employee has access to copies of those initial statements, essential evidence may have been put forever out of his reach.

In short, because of the peculiar relationship between employer and employee in railroad cases, to sustain an action under the Federal Employers' Liability Act, the injured worker, unlike the ordinary plaintiff in a tort case, is largely dependent upon the discovery procedures established by Rules 26-34 of the Federal Rules. Obviously, any weakening of these rules inevitably and irremediably will hamper him in his efforts to obtain redress.

On the other hand, it goes without saying that while an injured employee lingers in a hospital, perhaps for months, without friends to assist him in obtaining necessary information, insurance, steamship and railroad companies, operating through carefully trained and already-established staffs of investigators, lose no time in launching thorough investigations which include the rounding up of witnesses, the taking of statements and the thorough preparation of their defense.

That diligence on the part of defendants is not criticized. However, it is submitted, both the letter and the spirit of the discovery rules require the disclosure of the facts found by these investigators.

The discovery provisions of the Federal Rules of Civil Procedure were directed toward the elimination of the practice of dealing with a law suit as though it were a

game, a battle of wits between attorneys, while clients sat on the sidelines cheering the outcome. The discovery provisions were adopted and devised to enable parties who do not have the investigative resources of the large corporate defendants to obtain all the facts of their cases simply and inexpensively. In view of the fact that information about railroad accidents is usually peculiarly and principally, if not always exclusively, within the control of the defendant railroad or steamship company or its insurance carrier, it would be sheer mockery to extend to injured employees the benefits of the Federal Employers' Liability Act, but at the same time withhold from them the sole means of proving their case, by technical and ingenuous emasculation of the discovery rules.

Even a casual glance at the decisions under the discovery rules, as conceded by the opinion below, will reveal that many district courts, immune from review because of the usually interlocutory nature of decisions on discovery rules, have in many instances set up difficult barriers apart from those created by the opinion below. (See, for example, the lower court's reference to cases denying discovery for alleged non-compliance with the vague requirements of "good cause" under Rule 34. Compare Gordon v. Pennsylvania R. R., decided by Judge Kalodner in the Pennsylvania Eastern District on Aug. 15, 1946 (No. 5443) in which the Court held it could not find "good cause" for a request that defendant disclose to plaintiff his own statement taken from him, after the accident, by defendant.) But, the decision below, extending the attorney-client privilege, with its novel "work-product" rule, places in the hands of defendants a device with which to frustrate almost completely any and all attempts at discovery, even as to matters formerly conceded to be subject to discovery.

In our previous brief supporting the petition for a writ of certiorari, we said:

> "In point of fact, the instant case is indicative of the intention of insurance carriers and common carriers

to use this alleged veil of privilege, arising out of the assignment of counsel as supervisor of investigation, as a means of hiding and suppressing vital information necessary to the proper preparation and presentation of personal injury cases . . . The exception created by the decision of the Circuit Court in favor of privilege extending over the 'work product' of counsel may have appeared to the Court below as an innocuous and well intended exception. Already we have seen it expand, and soon we shall be able to obtain no information in advance of trial, as each of the defendants has, or will provide itself with counsel, and the alleged privilege of counsel's 'work product' will be used as a protective device, to silence all tongues and suppr s all evidence."

Our prediction that defendant railroads would use the extension of the attorney-client privilege and the "work-product" rule as a device to circumvent the discovery rules was no idle fear. Indeed, this concealment, which we foresaw as inevitable, has already become the stated policy of the very railroad involved in this case. As concrete evidence, we submit the following letter admittedly written by defendant railroad's General Counsel to all of its General Claim Agents. This letter is reported in the Court's opinion in DUGGER v. BALTIMORE & O. R. CO., 5 F.R.D. 334, (D.C.E.D., N.Y., 1946). We take the liberty of quoting this letter in full because it reveals dramatically the use to which defendants are already seeking to put the vaunted attorney-client privilege:

"May 22, 1945

"Mr. P. C. Garrott
"Mr. E. L. Williams
"General Claim Agents

"Gentlemen:

"All investigations made by you or any of the Claim Agents under the authority of you or either of you, all

statements taken from or made by any and all persons whether employees of The Baltimore and Ohio Railroad Company or not, relating to any accidents or damage to property, or other damages, and all reports made by any of your Claim Agents to you, whether such investigations were heretofore made or shall hereafter be made, shall be taken and held to be and to have been taken and made for the confidential use of the Law Department of the Baltimore and Ohio Railroad Company, and shall at all times be treated by you and all of your Claim Agents as confidential.

"All such investigations shall be made, such statements shall be taken and made, and all such reports shall be made in order to enable the Law Department to determine questions of liability in the case of every accident, in contemplation of possible or threatened litigation, in preparation for the defense of litigation either threatened, contemplated, or pending, and to enable the Law Department to give advice with respect to the settlements or defense of any and all claims that may arise against the Railroad Company as the result of such accident.

"Very truly yours,
"J. J. Cornwell
"General Counsel"

Obviously, if the lower court's decision is sustained and if hereafter every scintilla of evidence obtained by railroads in their investigations is treated as being taken confidentially by and for counsel, there would be absolutely nothing which an injured employee could ask for under the discovery rules. Having ascertained the identity of the witnesses to the company's negligence, the defendant, by the expedient of letting counsel take a statement from such witnesses, could effectively withhold from plaintiff all chance of determining even the existence or identity of essential witnesses. By the simple device of writing such a letter, as in the DUGGER case, all railroad, steamship and insurance companies could almost literally thumb

their noses at every discovery rule, under virtually any circumstances. Plaintiff's burden of proving negligence normally, if not invariably, would be an impossible task.

2. THE DECISION OF THE COURT IS NOT SUPPORTED BY AUTHORITY.

As already stated, while we fully endorse the legal views expressed in the brief of the petitioner, we shall not burden the Court with repetition; we seek only to supplement. We cannot forebear, however, from pointing out that the decision below has been distinctly disapproved by the Advisory Committee on Rules of Civil Procedure. Certainly, it would seem that if any one body is in a position to declare the purpose and intent of the Rules of Procedure and to determine whether the decision below is consistent therewith, that one body is the Advisory Committee on the Rules.

Walter P. Armstrong, former president of the American Bar Association, writing specifically about the instant case (See Armstrong, Report of the Advisory Committee on Federal Rules, 156 F 2d XIX, at Page XXXV) states:

> "In his opinion Judge Herbert F. Goodrich declared that the statements were not privileged under the testimonial rule, which excludes confidential communication between client and attorney; he held, however, that Rule 26 expressly limits the scope of examination to matters 'not privileged' and that 'privileged' used in this connection has a broader meaning than testimonial exclusion and extends to 'the work product' of the lawyer, such as the statements in question. *The Committee criticizes the decision and opinion in Hickman v. Taylor: 'The Advisory Committee, one member disagreeing, questions the view in Hickman v. Taylor, supra, that the word 'privileged' in Rule 26 (b) encompassed the situation before the court in that case. The Committee believes that the term*

'privileged' as used in that rule was not designated to include anything more than that embraced within the rule of testimonial exclusion regarding privileged communications as developed under the applicable laws of evidence, both common-law and statutory.'" (emphasis ours)

Mr. Armstrong then points out (at Page XXXVI) that in order to remove all doubts of its disapproval of the Hickman case, the Committee has proposed an amendment [1] to the rules. The purpose [2] of this amendment he epitomizes as follows:

> "Probably one of its (the amendment's) primary purposes was, in exceptional cases, to *broaden* the right of discovery beyond the limitation imposed by Hickman v. Taylor. Yet its approach is negative . . . *The clear implication is that in the cases of hardship provided for, statements of witnesses and other similar objective preparations for trial are discoverable even when they are the "work product" of a lawyer.*" (emphasis ours)

(1) The proposed amendment is as follows:

"The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."

(2) While Mr. Armstrong insists that the purpose of this amendment was to *broaden* the right of discovery beyond the limitation imposed by HICKMAN v. TAYLOR, he concedes that the draftsmanship of this amendment leaves "something to be desired" because "its approach is negative" (Armstrong, supra, at Page XXXVI). He adds:

> "It might have been better if the Rule had been both affirmatively and negatively stated and added to the scope of the examination definition in Rule 26, or if the scope of examination with this addition had been placed in a separate Rule and this Rule made expressly applicable to discovery under Rules 26, 33 and 34."

As Mr. Armstrong notes, it is "unfortunate" that there has been and there will be no opportunity for general discussion on this proposed amendment, it having been already released. While the purpose of the amendment, as stated by Mr. Armstrong, is appreciated, we join with

Professor Edmund Morgan, one of the leading writers on the Law of Evidence, the Reporter for the Model Code of Evidence, and a member of the Advisory Committee, says the following about the HICKMAN case: (MORGAN, LAW OF EVIDENCE, 1941-1945, 59 Harv. L. Rev. 481, 517-19)

> "The destruction of the notion of a lawsuit as a sort of intellectual duel comes slowly and painfully. But the right to hold back relevant material so as to surprise the opponent at the trial and to refuse to disclose the existence and content of evidence favorable to him is being challenged. . . . The most liberal provisions for discovery in civil cases are found in the Federal Rules of Civil Procedure, Rules 27-37. There is much conflict in the decisions as to the right under them to discover material collected by the attorney of the opposing party in the preparation of the case for advice or for trial. Privileged matter is exempt from discovery, but is evidence privileged which is collected by the attorney and his investigators or is communicated to the attorney by persons other than his client? Where the investigation is made for a party by his servants and the results are by them at his direction communicated to the attorney, the attorney-client privilege may be applicable. But it does

him in lamenting that hundreds of thousands of railroad workers and organized labor were not accorded an opportunity of expressing their views before the amendment was released.

Unfortunately, the "negative approach" of the language used in the proposed amendment may suggest that, *prima facie*, benefit of discovery is to be denied unless the applicant establishes affirmatively that discovery would not be unfair. Indeed, Mr. Armstrong concedes that the unfortunate form of the language of the amendment will probably encourage the argument "that the amendment is a further immunity to discovery in addition to the privilege accorded a lawyer under Hickman v. Taylor". (See Armstrong, supra, at XXXVII.)

It is strenuously urged that in view of the avowed purpose of the amendment, namely to *broaden* discovery, rather than to limit it, the proposed amendment should be modified before approval, to conform with that avowed purpose, lest the gesture of the Advisory Committee to these thousands of workers prove to be a serpent instead of a fish, or a Trojan horse rather than an aid. Discovery should normally be allowed as of right, unless the *party objecting* to disclosure *affirmatively* proves that to allow discovery would be unfair.

not cover material otherwise assembled by investigators acting at the direction of the attorney. Granting that a claim of the privilege could not be sustained if the material were produced and offered at the trial, is it nevertheless privileged against pre-trial discovery? The United States district judges have frequently refused to grant discovery of such material without basing the refusal upon privilege. The six judges of the District Court for Eastern Pennsylvania, sitting in banc, ruled that discovery of such material must be given. On appeal, the Court of Appeals for the Third Circuit, all six judges sitting, reversed and held that the material was privileged from discovery, saying: . . ."

After quoting from the opinion of the Circuit Court in this case, Mr. Morgan continues:

"The Court conceded that this 'is open to the gibes of the cynical,' but 'we believe it is sound policy; we know that it is irrefutably established in the law.' *Certainly this is an expansion of the attorney-client privilege which finds no justification in the language of any of the rules.* Whether it should be created by express language is a matter on which there is sharp disagreement among judges and lawyers. The real issue is the extent to which our adversary system of litigation shall be permitted to work to the advantage of parties able and willing to employ skillful and diligent counsel and to make expensive investigations over those who through ignorance or lack of funds or both must be satisfied with less. So long as the courts must depend upon the parties to frame the issues, produce the relevant material and present it to the trier of fact, so long will it be necessary for them to prevent the merely slothful from appropriating the fruits of the labor of the diligent. *But surely no rule of thumb which either permits the wise and*

diligent to work injustice or encourages the foolish and lazy to expect profit from their folly and indolence should be enacted.. The supposed necessity for a rule of thumb assumes trial judges to be weak or incompetent or both." (Italics supplied)

Apart from the cases cited in the brief of petitioner which reject the view of the lower court, we would also like to cite WILD v. PAYSON, Fed. Rules Service, Vol. IX, 34.411, Case 4 (1946), and DUGGER v. BALTIMORE O. R. CO., 5 F.R.D. 334, (D.C.E.D., N.Y., 1946). In both of these cases, district courts, under similar circumstances, refused to follow the rule of the Circuit Court in this case, rejecting it as being unsound.

CONCLUSION

Railroad employees of interstate carriers depend almost entirely upon the Federal Employers' Liability Act and kindred statutes for redress in occupational injuries. The practical consequences, to these workers, of the decision below cry out their own lament and protest: Those consequences render their rights under those federal statutes empty mockery. Already defendant railroad in this very case is striving to pull a dark veil of secrecy over every single fact it can collect. If the decision below is approved, all inhibition against concealment will have vanished, and with it, the discovery rules themselves.

It is submitted that there is no warrant in past authority or in principle for the lower court's extension of the attorney-client privilege, that this extension is in violation of the letter and spirit of the discovery rules, and that, according to the Advisory Committee, itself, the lower court's decision defeats, without warrant, the intended purpose and meaning of the rules. In the name of hundreds of thousands of injured railroad employees of today and tomorrow, we urge that the decision of Court below be re-

versed to the extent that it restricts the scope and freedom of discovery rules.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for United Railroad Workers of America, C.I.O.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased,

Petitioner,

against

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and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE

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Respondents.

PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

The undersigned, as general counsel for the National Maritime Union of America, respectfully petitions this Honorable Court for leave to file the accompanying brief

amicus curiae with the consent of the attorneys for the petitioner and respondents.

Your petitioner has read the petition of George E. Hickman and the brief submitted by his attorneys in support of the petition for writ of certiorari and endorses the arguments and reasons therein set forth.

The National Maritime Union of America alleges that it is an unincorporated membership organization, organized and existing under and by virtue of the laws of the State of New York, for the purpose of improving the conditions of workers employed in the American Merchant Marine. It has a membership of more than 90,000 seamen. Having written collective bargaining agreements with more than 125 private companies, it maintains branches in all of the principal ports along the Atlantic, Gulf and Pacific coasts including a branch in Puerto Rico and Hawaii.

The members of the petitioning union are engaged in a hazardous occupation. Various members of the National Maritime Union and their families have employed the undersigned to represent them in proceedings filed in the United States District Courts to recover damages for their personal injuries or death. Notwithstanding the protection afforded seamen under the law, substantive rights have frequently been nullified through the inability to discover the facts necessary for the proof of their claims. Statements from witnesses to an accident are promptly taken by ship officers or the claim agents of the shipowner. These witnesses, however, have frequently dispersed to unknown ships or ports and are unavailable to the injured seaman by the time he is sufficiently recovered to investigate the cause of his accident. The proof that the vessel was unseaworthy or machinery unserviceable or that the shipowner had prior notice of a dangerous condition is too often effectively buried in the files of the employer's agents or attorneys.

The purpose of the Federal Rules of Civil Procedure to ameliorate this unequal status is now threatened by the decision of the Circuit Court in the instant case. Unless reversed, the modernization of our legal procedure will have sustained a serious setback. Corporate defendants and insurance companies may find it to their advantage to maintain a proprietary interest in the facts they have uncovered. Seamen and employees generally, however, are vitally concerned that this Court reaffirm the principle that litigants shall have equal access to the facts regardless of the source.

It is understood that railroad and insurance companies will petition this Honorable Court for leave to file briefs amicus indicating the viewpoint of employer organizations. It is appropriate, therefore, that a labor organization be granted a similar opportunity to be heard on the important question before this Court.

The petitioner desires, also, to comment upon the amendment recently proposed by the Advisory Committee to revise the scope of discovery under the Federal Rules. This amendment goes far beyond the decision of the Circuit Court and its effect is virtually to deprive employees of the right to discovery altogether.

WHEREFORE, your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae, and that the decision of the Circuit Court should be reversed.

William J. Rainey

Attorney for Petitioner,
Office & P. O. Address,
291 Broadway,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

WILLIAM L. STANDARD, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

William L. Standard

Sworn to before me this
9th day of October, 1946.

Notary Public:
Kings Co. Clk's No. 150.
N. Y. Co. Clk's No. 720.
Commission Expires March 30, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased,

Petitioner,

against

JOHN M. TAYLOR and GEORGE H. ANDERSON, individually and trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

BRIEF OF AMICUS CURIAE

Preliminary Statement

There is an important question of law in the *Hickman* case which directly affects the rights of seamen. Many of them are members of the National Maritime Union as stated in the petition and many of them have suits pending in various courts throughout the United States to recover damages for injuries sustained on board ship.

The Court below has held that statements of third persons taken by attorneys are exempt from the discovery provisions of the Federal Rules. This decision cannot be justified either under law, logic or public policy. To uphold it means to nullify the basic intendment of the Federal Rules and foster the unequal administration of justice among persons.

POINT I

To extend attorney-client privilege to statements of third persons is to defeat the purpose of discovery under the Federal Rules.

The *ratio decidendi* of the Circuit Court decision is that "* * * 'privilege' as the term is used in the Federal Rule and 'privilege' as one finds the term in the law of evidence as a ground for excluding testimony are not identical."[1] This specific question cannot be adjudicated, however, without necessarily construing the scope of the rules generally. For if the investigation file of an attorney is sanctified, should not a similar exemption be granted the statements obtained by an investigator employed in the attorney's office, the office of the claim department of the corporation, or the claim agent of the insurance company? Conversely, should the lawyer alone be granted a monopoly of immunity, is it to be doubted that steamship, railroad, utility, insurance companies and the like immediately would delegate their attorneys to perform all investigations?

But what would otherwise enlarge the responsibility of the legal profession would not necessarily serve the best interests of the injured employee, his widow and family, or the indigent individual either unable to afford the services of an attorney or unaware of the necessity of an immediate retainer.

---

[1] *Hickman* v. *Taylor*, 154 F. 2d 212, 222.

To exclude from discovery statements of third persons without regard to who obtained them, or to limit the exclusion only to statements obtained by an attorney, would serve merely to accentuate the basic disparity between corporate defendants and insurance companies over individuals in their respective opportunities to investigate and prepare for litigation. The lawsuit would continue to be a game of chance in a sports arena between unequal contestants. In either event affirmance of the decision below would defeat the basic premise of the rules that "the guiding principle is the broad conception of the rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consist with the orderly and efficient functioning of the judicial process."[2]

Aside from considerations of policy, it is difficult to reconcile the decision of the Circuit Court with its reasoning. The conclusion is actually *non sequitur*. The Court found that under Rules 26 and 33 a party could properly demand a copy of a memorandum in connection with an interrogatory.[3] It approved the reformulation of the rule of discretion by the District Court that "unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."[4]

---

[2] *Hickman* v. *Taylor*, 4 F. R. D. 479, 481.

[3] Supra, p. 216.

[4] Ibid., p. 216. The District Court was of the opinion that the rule of discretion as quoted applied to all the discovery rules (supra, p. 481). The Circuit Court disagreed that it applied to Rule 34 because of the affirmative requirement that good cause be shown (p. 216). It is submitted that the framers of the rules intended no substantive difference in the scope of Rules 26 to 34; and that the differences in language are unsubstantial. Thus, despite the silence of Rule 33, the Circuit Court held that Rule 33 was subject to the same privilege limitation as Rules 26 and 34 (Ibid. p. 221). Though the Advisory Committee recommends a different rule of discretion (discussed in Point II), it nevertheless has proposed a series of amendments making explicit that the "Rules governing depositions are also made expressly applicable to the production of documents." Report of the Advisory Committee, 156 F. 2d XIX, XXXIV.

It was conceded that an attorney had no property right in the information which he "digs up about the client's case and has in his possession";[5] that the fruits of an attorney's diligence could be shared;[6] that the "fishing expeditions" by an opponent's lawyer were no longer objectionable because the Rules "are intended to go far in making information known to one party available to the other."[7] It quotes with approval the two guiding principles:

> "First, every party to a litigation is entitled to secure all evidence, information and documents, germane to the issues, even if they are in possession of an adverse party.
>
> "Second, such evidence, information and documents should be made available before the trial. The purpose is not only to facilitate the obtaining of evidence for use at the trial, but also to reduce the element of surprise to a minimum and shorter trials."[8]

It is granted further by the Circuit Court that the admissibility of documents in evidence is not the test in discovery proceedings;[9] that all the Rules of Discovery are subject to the same limitations of privilege;[10] that the term "privilege" if interpreted in its evidentiary sense would apply only to confidential statements made by a client to his lawyer, and that thus construed the statements demanded by the petitioner are not privileged because the statements were obtained from third persons.[11] It is also admitted that lawyers' files are not impregnable against

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[5] Ibid. p. 216.

[6] Ibid. p. 218.

[7] Ibid. p. 217.

[8] Ibid. p. 217, quoting Justice Holtzoff, New Federal Procedure in the Courts, 1940, published by the American Bar Association, p. 70.

[9] Ibid. pp. 217-218.

[10] Ibid. p. 221.

[11] Ibid. p. 222.

any inquiry from outside because "that depends upon what the lawyer puts in them. A piece of a machine which has hurt someone, *a document needed to show a fact*, many things required in a lawsuit find their way from client's hands to lawyer's file and are not to be concealed until the day of trial for that reason."[12]

The foregoing notwithstanding, the Court nevertheless holds that the requested statements need not be produced. Two reasons are assigned:

(a) As a matter of policy it would weaken the attorney-client relationship and prevent undivided allegiance if disclosure could be compelled of "intangible things, the results of the lawyer's tongue, pen and his head, for his client", i.e., the "work product" of the lawyer.[13]

(b) As a matter of law, the term privilege as used in the Rules has a broader meaning than testimonial exclusion and extends to "the work product" of a lawyer such as the statements in question.[14]

It is respectfully submitted that neither argument is tenable. If it be conceded that an attorney can be compelled to produce "a piece of machine which has hurt someone" or "a document needed to show a fact", no distinction in principle can be made in the case of facts contained in statements obtained from third persons. The contingency that an attorney might be called to contradict a witness because of a statement theretofore obtained by the attorney cannot be deemed to contravene the spirit of the Canons of Ethics. Any such testimony by the attorney would not be voluntary. It would be "essential to the ends of justice."[15] The testimony of the attorney would relate

[12] Ibid. p. 223.

[13] Ibid. pp. 220, 223.

[14] Ibid. p. 223.

[15] Canons of Ethics, Appearance of Lawyer as Witness for His Client: "* * * * Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

not to intangibles but to facts concerning which the client himself could not claim privilege. The attorney would not be disclosing his professional opinion or advice. He would be simply a medium through which his client, originally, and now the Court, could become apprised of the true facts. His status before the Court would be the same as that of any other investigator or witness in possession of facts necessary for a fair adjudication of an issue. Except, perhaps, in the limited instances of confidential communications between lawyer and client, the attorney has never been privileged to conceal facts from the Court. In no case can he condone perjury by his silence. The concern of the Court below at possible abuse occasioned by "the impact of the Rules for discovery when they affect the lawyer-client relationship", therefore, is exaggerated. Ample remedy to prevent abuse is afforded under Rules 30(b), (d), 31(d), 33 and 34. Under these provisions for the protection of parties and deponents, the Court may exercise its discretion in any instance where discovery would impinge upon confidential communications or the professional opinion of an attorney.

Neither is the Court below on sound ground when it extends the application of the term "privilege" as used in the Federal Rules beyond the testimonial privilege afforded attorney and client. The cases cited and relied on by the Court do not support its position.[16] The law has always permitted resistance to discovery as well as testimony where self-incrimination or secrets of state were affected. When applied to the attorney-client relationship, however, the cases have consistently limited the privilege to direct communications between attorney and client. Communications between attorney or client and third persons have never been protected. This is conceded by the Court.

To assume, therefore, that because incriminatory statements or "statements injurious to public interest" may be

[16] Ibid. p. 222, ftn. 16.

excluded from discovery, the Court is justified in enlarging the content of the term "privilege" as it affects lawyer-client communications is *non sequitur.*

The decision of the Court in extending the meaning of the term "privilege" to include the work product of an attorney, and to include within the definition of "work product" statements obtained by an attorney from third persons, is, therefore, a gratuitous amendment of the Rules which was never intended by the framers.

In this connection it is significant to point out that in its last report the Advisory Committee commenting on the instant case criticized the conclusion of the Court below. It states:[17]

> "The Committee criticizes the decision and opinion in Hickman v. Taylor. * * * The Committee believes that the term 'privileged' as used in that rule was not designated to include anything more than that imposed within the rule of testimonial exclusion regarding privileged communications developed under the applicable laws of evidence, by common-law and statutory."

POINT II

The amendment proposed by the Advisory Committee to revise the scope of discovery is unsound and should be rejected.

Going beyond the limited issue of privilege in the instant case, the opportunity is here taken to comment upon the amendment proposed by the Advisory Committee to revise the scope of discovery. The proposed amendment reads as follows:

> "The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial

[17] Report of the Advisory Committee, supra, p. XXXV.

unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."[18]

The amendment is proposed to avoid the consequences of the Circuit Court decision with the rationale of which the Advisory Committee disagrees, and as a compromise between complete exclusion and complete discovery.[19] The proposed amendment, however, shuts the door to discovery even more effectively than does the decision appealed from. Whereas the Circuit Court would exclude from discovery only statements prepared by an attorney, the amendment would exclude statements whether obtained or prepared by the party, his attorney, surety, indemnitor or agent.

Furthermore, placing the burden of proof upon the discoverer to show that the denial of relief would cause hardship and injustice is virtually tantamount to complete exclusion. Ignorant of the facts, the party seeking discovery will not be able to particularize his demand, and his appeal to the Court would necessarily be couched in unpersuasive generalization.

The amendment finally violates the spirit of the Rules. The emphasis is not on "granting the widest latitude in ascertaining before trial facts concerning the real issue in dispute",[20] but rather in limiting such relief to exceptional cases.

It should be pointed out that the Circuit Court rejected a negative formulation of a right to discovery and adopted the formulation of the District Court that "unless, under the circumstances of any particular case, the Court is

[18] Ibid. p. XXXVI.

[19] Ibid. p. XXXVI.

[20] *Nichols v. Sunborn Company*, 24 Fed. Supp. 908, 910.

satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."[21]

The amendment proposed by the Advisory Committee, therefore, does not contribute to the solution of the proper scope of discovery and should be rejected.

The Rules as presently drawn require no amendment other than one to make explicit that the Rules governing depositions are expressly applicable to the production of documents and that the scope of discovery whether by deposition, interrogatory or demand for the production and inspection of original documents shall for all three be the same.

Thus formulated the fundamental purpose of the Rules can be achieved. Litigants would have the unlimited right to discovery of relevant, non-privileged material in the possession of their adversaries. The burden of proof to show abuse, hardship or injustice would rest upon the possessor of the material. In any proper case the discretion of the Court could be invoked under the available rules for the protection of the parties and deponents.

CONCLUSION

The decision of the Circuit Court should be reversed.

Respectfully submitted,

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EDWARD J. MALAMENT,
of Counsel.

[21] Supra, ftn. 4.

FILE COPY

IN THE

Supreme Court of the United States

No. 47. **October Term, 1946.**

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,

Petitioner,

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually, and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

MOTION OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES FOR LEAVE TO FILE THE ANNEXED BRIEF AND TO ARGUE, AMICUS CURIAE, IN THE WITHIN CASE.

JOHN C. PRIZER, New York,
ALBERT T. GOULD, Boston,
LESLIE C. KRUSEN, Philadelphia,
D. ROGER ENGLAR, New York,
JOSEPH W. HENDERSON, Philadelphia,
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MOTION OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES FOR LEAVE TO FILE THE ANNEXED BRIEF AND TO ARGUE, AMICUS CURIAE IN THE WITHIN CASE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes The Maritime Law Association of the United States and respectfully moves that the Court grant leave to file the annexed brief and to argue, amicus curiae, upon the hearing of the within cause.

In accordance with paragraph 9 of Rule 27, there has been filed with the Court the written consent of Counsel

for the Respondent and the letter from Counsel for the Petitioner in which it is stated that Counsel for the Petitioner does not oppose this motion.

Respectfully submitted,

JOHN C. PRIZER, New York,
ALBERT T. GOULD, Boston,
LESLIE C. KRUSEN, Philadelphia,
D. ROGER ENGLAR, New York,
JOSEPH W. HENDERSON, Philadelphia,
JOS. M. RAULT, New Orleans,
ARCHIE M. STEVENSON, San Francisco,
THOMAS E. BYRNE, JR., Philadelphia,
Counsel for the Maritime Law Association of the United States.

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AMICUS CURIAE.

This brief is presented on behalf of The Maritime Law Association of the United States, an Association whose membership is nation wide. Eighty-eight per cent. of the members are lawyers and judges. All are interested in the practice of maritime law. The Association has committees to confer with the Advisory Committee appointed by this Court to recommend changes in the Rules of Civil Procedure and also to confer with the judges of particular districts regarding the local rules of those districts.

It is because of the interest and concern of the members of the Association as practicing lawyers that this brief is filed in support of the decision of the Court below.

The Association is not concerned with, and this brief will not touch upon, any issues which are purely local to the present case. It will leave to discussion by the parties the question of whether the petitioner's contention is properly before the Court at this time. We are concerned only with the proper application of the Rules of Civil Procedure and the orderly administration of impartial justice. Those questions do not depend upon the narrow facts of a particular case or upon the question of whether the party seeking to invoke the rules is a plaintiff or a defendant, an individual or a corporation.

The broader issues of this cause involve every lawyer practicing in the Federal Courts and every litigant whose case is tried in those courts. The decision of the district court not only overrules its own prior decisions (Record 64a, 65a) but would effect a fundamental, far reaching change in the basic and ancient concepts which, without

challenge, have regulated the practice of law for centuries. We think it is not an exaggeration to say that the district court decision would revolutionize the ordinary every day practice of law—not only the actual practice in the courts, but the routine procedures of the law office, and the proven and long accepted methods of preparing a client's case for trial.

So far as we know it has never been held,—or even urged—that any form of pre-trial discovery could force an opposing *lawyer* (an officer of the court—not a party or witness) to testify, or reduce to writing for the convenience of his adversary, the content of *oral* communications made to him by prospective witnesses in his routine preparation of the cause for trial. However, that is the frank and avowed intent of the opinion and order of the district court, and we believe the ruling to be such a fundamental departure from the settled traditions of legal practice as vitally to affect the rights, privileges and immunities of every lawyer and litigant in the United States courts.

This brief will not contend that a party to a litigation should be denied access to evidence and facts within the control or knowledge of an adverse party. The rules were drawn for the purpose of making evidence and facts available and have, in the past, been applied with commendable liberality to accomplish that purpose. They have proved very useful in simplifying issues and in promoting justice. The disclosures which the respondent's lawyer is called upon by petitioner to make in the present case, however, are neither evidence nor are they facts. Petitioner seeks to reach the private records and recollection of a lawyer with respect to the work that he has done to date in the investigation of a case and in its preparation for trial.

Point. 1.

The Rules of Civil Procedure Do Not Authorize an Order Upon the Attorney for a Party Requiring Him to Produce for Examination Before Trial His Private Memoranda, Statements, Notes and Recollections.

The Petitioner suggests that the particular rules involved in this argument are Nos. 26, 33 and 34 (Petitioner's Brief, page 11). The District Court treated the question as if all three rules were involved, but the opinion of the Circuit Court of Appeals, six judges sitting, pointed out some of the inherent differences between the three rules.

We will not set out here the full text of the three rules. We will call to the attention of the Court the distinct fields in which each operates. Rule 26, sub-section (2), provides in brief, that a party may take the deposition of any person, whether a party or not, for the purpose of discovery or for use as evidence. The attendance of witnesses may be compelled by subpoena. Subsection (b) of Rule 26 is concerned with the scope of the examination and provides that the deponent may be examined regarding any matter, not privileged, which is relative to the subject matter and including the existence, description, nature, custody, condition and location of any books, documents or other tangible needs and the identity and location of persons having knowledge of relative facts.

Rule 33 provides that any party may serve written interrogations upon any adverse party.

Rule 34 provides that upon motion of any party showing good cause, the Court may order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, objects or tangible needs, not privileged, which constitute or contain evidence material to any matter involved in the action.

Rule 26 was intended to be, and in practice is, of great value to any party, plaintiff or defendant, individual or

corporate, rich or poor, who is at a disadvantage in locating and obtaining information. Not only adverse parties may be called, but any other person may be examined under oath and attendance compelled by subpoena. The rule is a two-edged sword and is limited only by privilege and the requirement that the examination be confined to matter which is relevant to the subject matter involved in the pending action, Rule 26 is a potent weapon. Its purpose is to give to any party the right to obtain facts necessary or helpful to the presentation of his claim or defense. It would serve no useful purpose and would, in the end, obstruct justice to require a lawyer who has no personal knowledge of the facts giving rise to the cause of action, to disclose his writings, his rough notes or memoranda and his personal recollection as to what persons purporting to have knowledge of the facts had indicated to him in interviews which he may have had with them.

Rule 33 applies by its terms only to parties and not to counsel for the parties. A lawyer's private memoranda and personal recollection in connection with his work upon a particular case are peculiarly personal in character and it would be a forced construction, indeed, which would require such personal data to be produced by the lawyer under a rule which provides that interrogatories may be addressed to a *party*.

Rule 34 is the only discovery rule designed to govern the production for inspection of documents, papers, books, etc. The rule specifically requires that the Court may direct an order under Rule 34 to *any party*. The rule is equally clear that the papers which may be called for under Rule 34 are those "which *constitute or contain evidence* material to any matter involving the action." (Italics ours.)

We are unable to subscribe to the view that under Rule 34 a lawyer, who is not a party to the action, could be required to produce his private memoranda which contained references to or notes concerning his conversations with other persons, whether they be the client or merely a wit-

ness having knowledge of the facts. It is the Petitioner's contention in the present case that under Rule 33, or perhaps Rule 34 or 26, he is entitled to demand from counsel for one of the other parties, complete disclosure of that lawyer's work done in preparation for trial. The contention is certainly novel. The Rules of Civil Procedure have been in force in the United States District Courts since 1938 and never in the intervening years, to our knowledge, has anyone sought to carry the discovery procedure so far. If it had been within the contemplation of the Advisory Committee and of this Court in promulgating the rules that this could be done, it seems to us that the contention would have been made before this case arose. In a large number of cases, the Courts, in the exercise of their discretion, have refused to require *a party* to produce statements and memoranda procured in preparation of the case for trial. *Caraballo v. Export Steamship Corp.*, Fed. Rules Serv. Col. 3, p. 387 (S. D., N. Y.); *Piorkowski v. Socony Vacuum Oil Co.*, Fed. Rules Serv. Vol. 4, p. 534 (M. D., Pa.); *Courteau v. Interlake Steamship Co.*, Fed. Rules Serv. Vol. 4, p. 546 (W. D., Mich.); *Nelson v. Reid*, 4 Fed. Rules Serv. Vol. 4, p. 546; *Kenealy v. Texas Co.*, 29 F. Supp. 502; *Barwick v. Powell*, Fed. Rules Serv. Vol. 4, p. 548 (S. D., N. Y.); *Revheim v. Merritt-Chapman & Scott Corporation*, 2 F. R. D. 361; Fed. Rules Serv. Vol. 6, p. 540; *Poppino v. Jones Store Co.*, 1 F. R. D. 215; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, 29 F. Supp. 504; *Schweinert v. Insurance Co. of North America*, Fed. Rules Serv. Vol. 3, 26b. 211, Case 2. In a line of cases of which *Condry v. Buckeye S. S. Co.*, 4 F. R. D. 316; 8 Fed. Rules Serv. 34.11-5 (W. D., Pa.) is an example, it has been held that such statements need not be produced because they are not "evidence". This we think is a sound view in the light of the language used by the Advisory Committee and this Court in framing the rules.

The language of Rule 34 differs from that used in Rule 26. Rule 34 provides for the production of documents.

Under Rule 26, the deponent may be examined regarding any matter, not privileged, which is relevant. Rule 34 provides for the production of documents which constitute or contain evidence. There is a distinction in the language used and if that was not accidental is made rather clear by an analysis of the development of the rules. The following quotation illustrates this.

> "Historically, discovery of documents has generally been limited to matters admissible in evidence. Old Equity Rule 58, the predecessor of Rule 34, referred to documents 'containing evidence material to the cause of action or defense', and this was interpreted to permit discovery only of admissible matters. Maywood v. Texas Co., 17 F. (2d) 490 (N. D. Tex. 1927); Finance Co. of America v. Brock, 80 F. (2d) 713 (C. C. A. 5th, 1936). A leading New York decision by Chief Judge Cardozo laid down the rule that 'Documents to be subject to inspection must be evidence themselves,' People ex rel Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927), and other state cases have adopted a similar view. City Nat. Bank v. Wofford, 189 Ark. 914, 75 S. W. (2d) 666 (1934); Travelers Ins. Co. v. Jackson, 201 Iowa 43, 206 N. W. 98 (1925); Miller v. New England Mut. L. I. Co., 14 N. Y. S. (2d) 129 (1939); Marx v. Merchants Nat. Properties, Inc., 148 Misc. 6, 265 N. Y. Supp. 163 (1933). Whatever may have been the reasons for it, this tendency was undoubtedly known to the members of the Advisory Committee in drafting Rule 34, and if they had intended to liberalize the rule they could have used less restrictive language. In fact, the history of the rule indicates that a broader scope of discovery was contemplated but decided against. The first draft of the rule would have permitted discovery of documents, etc., 'relevant to any matter involved in the action'—almost the exact language of present Rule 26b. Preliminary Draft (May, 1936) Rule 38. In the final draft, however, the present wording was substituted.

It hardly seems reasonable to suppose that the draftsmen intended Rules 26 b and 34 to be construed alike when different terminology was deliberately employed." Commentary, Federal Rules Service, Vol. 4, page 919 at 921.

Viewed in the light of historical development and the difference in the language used, it seems clear that it was never the intention of the rules to require an attorney to disclose the data and memoranda obtained and made by him in performing his duty for his client.

Point 2.

To Permit Discovery to Go Beyond the Limits Set by the Circuit Court of Appeals Would Only Confuse the Issues and Obstruct the Proper Administrtaion of Justice.

In the Petitioner's brief, the lawyer's statements, notes and memoranda are treated and referred to as if they and their contents constituted the facts of the case. Actually, a simple analysis will show that they are neither factual or evidentiary. The notes of counsel and other material which the District Court ordered produced are the merest hearsay. Even the written statement prepared by the lawyer and signed by the witness would not and could not be a fact in the case. To require the lawyer to turn over to the adverse party his notes of his conversations with a witness would not advance the adversary's knowledge of the facts or simplify the issues to be presented to the jury. It would, on the contrary, confuse the real issues in the case to permit a witness to be cross-examined concerning a set of notes which represent some other person's recollection of a conversation with the witness weeks or even months before. Either the witness or the lawyer would be placed in a false light. We submit that this is neither necessary nor desirable and that it was never the intention of the discovery rules to bring about such a situation.

Unless we are to abandon the Anglo-Saxon Common Law system and adopt the Continental System of Civil Law, the mere statements of witnesses are not evidence. They are not even the facts of the case. The Common Law system provides for the oral testimony of witnesses upon direct and cross-examination. Even such testimony is not of itself fact. It is rather the best system yet evolved for ascertaining facts which are not physically demonstrable. An original contract, a book of original entries, a report in the usual course of business, a broken piece of machinery and many other things are themselves factual and evidentiary. If they are relevant to the controversy, they become evidence upon identification.

The notes, statements and memoranda which the lawyer makes in preparation of his client's case are essentially different. During preparation, the lawyer is engaged in assembling information. He then weighs it against the applicable law and forms an opinion which is the basis for his recommendation to his client. He is a lawyer during that process just as much as he is a lawyer when he steps to the Bar of the Court to argue his client's case. It is one of his duties as a lawyer to investigate and sift out the facts of the case. One of the accepted ways of doing so is by means of interviewing witnesses and recording the information obtained. The interviews of the lawyer with the alleged witness seldom take place under ideal conditions. Haste on the part of the lawyer or the witness may prevent detailed covering of the facts. Seldom if ever is the person supplying the information placed under oath. The like or dislike of the witness for one of the parties and the universal desire to avoid becoming enmeshed in some other person's case often make it impossible for the lawyer to obtain a complete or clear picture at the first, and sometimes in subsequent, interviews. It is sometimes true that the witness has had one drink too many to enable him to give a rational account of events. It is often the case that, for lack of information on the part of the lawyer, a whole avenue of information is not developed at the interview

with a prospective witness. A lawyer may reject the recital of facts by a particular witness on the ground that they are in conflict with the incontrovertible physical facts. Is his client to be put in the position at the time of trial of explaining away the failure to call such a witness to testify, or of explaining a superficial inconsistency between a prior statement and the testimony of the witness? Does it not then become necessary for the lawyer to become a witness in the case?

The issues in the case are not as simple as the petitioner's brief would indicate. It is not a question of the rich and the poor, the individual and the corporation. The Court is here being asked to set up a rule which will apply to all litigants and all lawyers. The fact that the party seeking discovery in this case is the administrator of the estate of a seaman is not dispositive of the broader issues of the case. More frequently in practice it would be the indivdual who would be subjected to unlimited discovery by the wealthier adversary who had unlimited means to expend for discovery. It is true that some corporations have complete claims departments for investigatory purposes. It is equally true that the individual who is involved in litigation must rely entirely upon his lawyer to develop the information necessary for him to proceed. He is not sufficiently experienced to investigate his own case. There is, therefore, no sound reason for the argument of individual versus corporation when it pertains to the files of counsel.

It seems to us that the proper approach to discovery is that it was intended to enable one party to know what facts his opponent relied upon as the basis of his claim or defense. If the case resolved itself into a question of law, discovery was not intended to permit one lawyer to develop the other lawyer's points of law nor the cases upon which he relied. If one party did not know certain facts or the names of witnesses, discovery would at least put him on an equal footing in the search for facts. Discovery

was never intended, we submit, to enable one party to find out what his adversary knew about the case or thought the facts to be. Still less was it intended as a means of learning what had been said to opposing counsel by someone having knowledge of the facts. If facts were the objective, then the development of facts must be the line of limitation beyond which discovery may not legitimately go.

Point 3.

The History of Discovery Procedure.

The discovery process in those countries applying the English common law system, as contrasted with the continental system of civil law, probably had its beginning in the English Rules under the Judicature Act (1873), O. 31, RRI-29. The English rules have been developed through the judicial process ever since that time. The English authorities on the subject of discovery indicate that four rather definite grounds of "privilege" have been developed and include the doctrine of "legal professional privilege." See Bray—Digest of the Law of Discovery with Practice Notes (2nd Ed.). In the United States, the practice in most of the States has developed discovery in some form. This has been done either by statutory enactment or rules of Court, although some States still require that a separate proceeding in equity be commenced where discovery is necessary. See Ragland—Discovery Before Trial. When the Advisory Committee submitted to this Court the proposed draft of the Federal Rules of Civil Procedure, the comments of the Committee would indicate that it was the intention that the rules should follow the practice which had already been tried and tested in England and in some of the States. The comment of the Committee with respect to Rule 34, for example, reads as follows:

> "In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 31, 4. 4. 14, et seq., or

for the inspection of tangible property or for entry upon land, O. 50, 4. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich. Court Rules Ann. (Searl, 1933) Rule 41, Sec. 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, Discovery Before Trial (1932), Appendix, p. 267, setting out the statutes.

Compare Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph)."

The comment of the Advisory Committee would certainly indicate to anyone examining it that our statement above is correct. This is borne out by a statement made by Edson R. Sunderland, a member of the Advisory Committe, who, we are informed, has had a great deal to do with the rules pertaining to discovery. Mr. Sunderland spoke at an institute conducted under the auspices of the American Bar Association at Cleveland, Ohio, in July, 1938. At one point Mr. Sunderland states: "Rule 34 provides for discovery of documents and other tangible things. This can be had only upon the Court's order, and a mere motion is insufficient." At another point in the same discussion, p. 282 of the volume entitled "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1928," Mr. Sunderland is quoted as follows:

"That was the situation that the Advisory Committee had to deal with—practically no discovery in the federal courts, and every variety both of liberality and restriction among the various states and in the English jurisdictions. *And I think it can be said that every type of discovery which has been authorized in*

> *these rules is a type of discovery which has been in successful operation somewhere."* (Italics ours.)

If it was the intention of the Advisory Committee to adopt a discovery practice which had been in successful operation somewhere, then it can scarcely be said that it was the intention of the Committee to allow discovery such as is sought in the case at bar. Our research has failed to disclose any jurisdiction which, under the guise of discovery, would permit one party to litigation to obtain statements and information gathered by an attorney in preparation of his client's case. We very much doubt that the Petitioner can point to any system of practice in any of the States which goes beyond the doctrine which has been enunciated by the six Judges of the Circuit Court of Appeals in this case. If it is true that the Advisory Committee, as its comment to Rule 34 and the above statements by one of its members would indicate, was guided by the English discovery practice and that which theretofore had existed in one or more of the States or under the old equity rules, then we think its intent at the time of drafting the rules is clear.

The question of the limit which shall be allowed for discovery of papers and documents prepared solely by reason of the fact that litigation is pending has caused the Advisory Committee much difficulty. The second preliminary draft of proposed amendments (May, 1945) provided for an amendment to Rule 30 (b), as follows:

> "The Court in which the action is pending may make an order . . . that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial."

The comment of the Committee upon this proposed change is very interesting and emphasizes one of the important reasons why this brief is before the Court. The comment reads as follows:

> ". . . it may be possible to state some general standard to carry out the idea that in exercising its discretion the Court shall forbid the inquiring into matters which, if obtained, might be the subject of abuse and which, if obtained, are of no great value to the party making the inquiry if the material is legitimately used."

The Committee apparently admits that the discovery problem has not been satisfactorily solved. The third draft of proposed amendment published by the Committee in June, 1946, attacks the problem from a different angle than that which had been attempted in the second draft. The approach of the Committee is, however, negative in character. The amendment to rule 30 (b) as now proposed reads:

> "The Court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation, or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production . . ."

We understand that in answers to interrogatories filed earlier in this case, the names and addresses of all of the witnesses who were known to the Defendants were made available to the Plaintiff. We presume that no one will question the statement that under the clear language of Rule 26, the Petitioner could have proceeded to examine these witnesses by depositions, either orally or upon written interrogatories. Rule 26 is implemented by Rule 45 which would have enabled the Petitioner to have compelled the attendance of the witnesses, who could then have been sworn and compelled to divulge all of the factual information they possessed, under oath. The record here does not reveal that any such attempt was ever made. Whether or not the Petitioner, his counsel, or any one acting for

them ever attempted to interview these witnesses informally does not, of course, appear in this record. Certainly there is nothing which would have prevented such procedure. We urge that the Petitioner has not exhausted the remedies which are made available to him under the other rules of the discovery procedure and that no good reason has been shown for an extreme interpretation of the rules which would compel the attorney for one of the parties to turn over to the Petitioner and his counsel those written statements which he made during his interviews with prospective witnesses and compel the same counsel to reduce to writing his mental impressions so that the Petitioner may have the benefit of them. If it were not for the extreme interpretation which the Petitioner urges upon this Court, there would not be the universal interest among lawyers in this particular case. That interest only arises because the lawyer sees himself becoming enmeshed in the controversies of his clients to the extent that the personal data which he has obtained in order that he may properly perform his function as an attorney may now be thrown open to inspection by other lawyers and their clients and may even find its way to becoming a part of the public records of the United States District Court. The concept of that possibility is completely foreign to the traditional function of the attorney.

The discovery practice under the Admiralty Rules has operated satisfactorily in the United States District Courts for many years. Admiralty practice in our country has been characterized by informality and the refusal to permit the defeat of substantial justice by technicalities. The Supreme Court Admiralty Rules contain provisions for interrogatories and for the production of documents similar to the Rules of Civil Procedure (see Admiralty Rule 31 relative to interrogatories and Admiralty Rule 32 relative to the production of documents). An examination of the history of the present Rules of Civil Procedure will show that the admiralty practice served as one of the guides which the Advisory Committee followed. Under a liberal

application of the Admiralty Rules records and reports made in the usual course of business of a party, log books, repair bills, stowage plans, blueprints of vessels, photographs and like tangible things have been required to be produced and have proved properly helpful to the adverse party. Such documents are all factual as are the names and addresses of probable witnesses. Neither libellants nor respondents in the admiralty practice have found it necessary to contend that the opposing proctors' preparations for trial need be disclosed in order to prevent surprise or otherwise accomplish justice between the parties. It seems to us probable that the successful operation of the informal and liberal admiralty practice influenced the framers of the present civil rules.

Point 4.

The Discovery Provisions of the Rules Should Not Be So Construed as to Defeat the Other Purposes of the Rules.

Rule 1 of the Federal Rules of Civil Procedure provides, inter alia, that: "They (the Rules) shall be construed to secure the just, speedy, and inexpensive determination of every action." We take a practical approach to the problem. There are two potential discovery problems in every action which is brought to issue. The number of cases brought in the District Courts has increased and the discovery procedure is coming into more general use by all lawyers. If the discovery process is to be enlarged beyond the bounds which have heretofore encompassed it, the result will be to bog down the judicial process and prevent "the speedy and inexpensive determination of every action." In the case at bar, the opinion and order of the District Court indicated that the Court would examine Mr. Fortenbaugh's papers and memoranda and "sift out" those matters which it did not consider proper for discovery. In *United States v. Aluminum Company of America, et al.*, 26 Fed. Supp. 711 at 713, the Court said, with respect to discovery of documents,

> "I conclude, therefore, that it is essential that I examine every document before determining, and that by such examination I determine, whether it may properly be inspected by the government."

In that case, the Court had to examine 87 documents and only 28 were permitted to be examined by counsel for the government.

From the standpoint of the lawyer and client in such cases, the expense and time required are increased enormously. It is entirely possible that the client who cannot afford protracted litigation would find his case so encumbered with discovery proceedings instigated by his more affluent adversary that justice would be defeated.

Point 5.
The Constitutional Question.

The Circuit Court of Appeals did not pass upon any question of constitutionality in reaching its decision in this case. It seems to us that a constitutional question is necessarily presented. Our belief in this regard is strengthened by the provision of the Enabling Act, Act of June 19, 1934, c. 651, Sec. 1, 28 U. S. C. A. 723b, which provided, in part, that ". . . said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The Fourth and Fifth Amendments to the Constitution, although not necessarily in "pari materia", supplement each other in the protection they give to the rights of the individual. The part of the Fourth Amendment which is pertinent to these proceedings is the clause which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Under Petitioner's contention, a serious constitutional question arises under the unreasonable search and seizure provision of the Fourth Amendment. As Rule 34 was written, it presents no constitutional question since its very

language provides for a showing of good cause before an order will issue for the production of a document. The decision of the District Court in the case at bar struck down that good cause requirement of Rule 34 and in so doing we submit that it ignored the rights guaranteed by the Fourth Amendment.

There is no decided case which our research has disclosed covering the same facts as those in the case at bar. Similar problems, however, have arisen and have been the subject of consideration and decision by this Court. In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298; 44 S. Ct. 336, a mandamus proceeding was instituted by the Federal Trade Commission to compel production by the defendant of certain correspondence and records. The Federal Trade Commission claimed that its broad investigatory powers under Compiled Statute, Secs. 8836e and 8836f, entitled it to the relief sought. This Court, speaking through Mr. Justice Holmes, held:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 14 Sup. Ct. 1125, 38 L. Ed. 1047), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. *We do not discuss the qustion whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent.*" (Italics ours.)
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> • • • •
>
> "We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or sus-

picion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. United States v. Delaware & Hudson Co., 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854."

Certainly the Rules of Civil Procedure can and do not go further than the statutory authority granted to the Federal Trade Commission. What has already been said by this Court with respect to the one is equally applicable to the other.

The language of the Fifth Amendment which may also be pertinent here under Petitioner's view is that which reads:

". . . nor be deprived of life, liberty or property without due process of law, . . . ".

Modern concepts of property have enlarged property rights beyond those which were known to the framers of the Constitution. A man may now refer to his property right in intellectual production. *Cf. Waring v. W. D. A. S. Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631. Under the modern and more liberal concepts of property, the lawyer should be granted property right in the product of "his tongue, his pen and his head", which should not be taken from him without due process of law.

Point 6.

The Doctrine of Privilege Was Properly Applied by the Circuit Court of Appeals.

The Circuit Court of Appeals was right in recognizing that the word "privileged", when used in a different context, has a meaning broader than the narrow American

testimonial exclusion. The doctrine of privileged communication was developed as a part of the law of evidence. As such, it is fully discussed in the Petitioner's brief. That discussion, however, is confined to the meaning of the word as it is used in the law of evidence. The same word can be used to convey a much broader or an entirely different meaning, depending upon the circumstances of its use. In footnote 16 to the Opinion of the Circuit Court of Appeals in this case, there are illustrations and citations where the term "privileged" has been extended to other situations. In addition to those, we suggest to the Court that privilege has additional meanings as it applies to the physician, the priest or the marital relationship. There is a sound logic behind the view taken by the Circuit Court of Appeals that public policy requires the cloak of privilege to be extended to the lawyer when he is acting for a client in preparation for the trial of litigation.

The Circuit Court of Appeals has given one illustration of the situation which might arise if the privilege of the attorney is not recognized. As the Circuit Court of Appeals notes, the possible conflict with the canons of ethics might put it within the power of one party to make use of the discovery proceedings in such a way as to "get rid of a dangerous adversary". Another very practical reason is that in cases tried before a jury, the calling of a lawyer to the stand to testify and, perhaps, contradict something that has been said by a witness would only serve to confuse the issues.

The Advisory Committee of this Court has, in the proposed amendments to the Rules, now reached the same result as was reached by the Circuit Court of Appeals in the case at bar. Perhaps one of the problems which the Committee found it difficult to solve was that which it refers to in the note above cited from the second preliminary draft. We refer to the reference made by the Committee to the *legitimate* use of the material obtained upon discovery. (*Supra*, p. 15.)

We do not believe that the Rules of Court should place in the hands of an unscrupulous attorney, or the unscrupulous client of an honest attorney, an instrumentality whereby he may ascertain in advance the evidence to be presented by his adversary and then shape his own case so as to meet it. Such a weapon is too easily the subject of abuse. Cf. *Benbow v. Low*, 16 Ch. D. 93, 95 (Opinion by Jessel, M. R.).

Conclusion.

For all of the reasons set forth in this brief, we urge upon this Court the view that the result reached by the Circuit Court of Appeals is correct. We go further in finding reasons to support not only the reasoning but the result. The Circuit Court has applied to discovery proceedings in the Federal Courts the same limitations which have been reached in England after years of interpretation and modification. We think it worthy of note that the rule for which we here contend is in accord with a host of decisions in the Federal District Courts and is the same rule which operated successfully for several years in the Eastern District of Pennsylvania under the decision in *Stark v. American Dredging Co.*, 3 F. R. D. 300.

We take the position that the rules do not justify the result reached by the District Court. As the Circuit Court of Appeals points out, a lawyer should never be placed in the position where he might be called as a witness not only for, but possibly against his client. Such a concept is entirely foreign to the function, tradition and code of ethics of the lawyer. We do not urge any curtailment in the disclosure of facts under discovery, but we point out to the Court the possible abuses which are inherent in any system which would permit one party to discover the degree of preparation of his adversary's case. With respect to the latter term, may we point out to the court what we consider to be an unfair reference to a statement made by George Wharton Pepper, Vice-Chairman of the Advis-

ory Committee, at a symposium held on June 21, 1946, at the Ninth Annual Judicial Conference of the Third Judicial Circuit. We refer to the statements on page 32 of Petitioner's brief. The entire proceedings are reported at 5 Federal Rules Decisions 403 (Advance Sheets for September, 1946.) The stenographic record of Mr. Pepper's remarks appears on page 404. We think that a fair reading of them does not warrant the observations concerning them which have been made in the Petitioner's brief.

We are concerned not only with the position of the lawyer under unlimited discovery. The client whose adversary is making a false claim or defense is put into a precarious and unfair position. The party guilty of the fraud can, through discovery, ascertain in advance just how far he can press his false claim or defense with impunity. We are not convinced that the benefits for which the petitioner argues are sufficient when they are weighed against the legitimate uses which could be made of the memoranda of counsel in preparing his client's case for trial. As the Advisory Committee pointed out, the legitimate use of such discovery is questionable. If abused, the damage would far outweigh the gain. We agree that the lawyer does not "make the facts of a case". By the same token, the knowledge which a lawyer does or does not have is not one of the facts in the case if the game is being played with all cards on the table.

The disclosure here sought would make the information in a lawyer's files available not only to opposing counsel but to the parties in interest and perhaps even to the witnesses on the other side. Until human nature changes there is nothing which can prevent the dishonest or unscrupulous witness or party from shaping his testimony to meet the evidence of the other side. That is not the "sporting theory of justice", it is the perversion of the judicial process. No party, whether plaintiff or defendant, can protect himself from such a practice. It is therefore respectfully submitted that there is a question of privilege

involved in this case which stems from considerations of sound public policy and the necessity to maintain a high standard in the conduct of judicial proceedings. We urge this Court to recognize and uphold the concept that a lawyer is an officer of the Court in accordance with his oath and that no rule of court should be so construed as to make him a participant in a case where his proper duties require only that he be an advocate.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

Petitioner,

vs.

JOHN M. TAYLOR and GEORGE ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, *et al.*

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

Opinions of Courts Below

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Hickman v. *Taylor* (R. 81), 153 F. 2d 212 (C. C. A. 3).

I.

The present Rules of Civil Procedure for the District Courts of the United States* were plainly not intended by the Advisory Committee, which, in co-

* Adopted by this Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064; U. S. C., title 28, sec. 723c), effective September 16, 1938.

operation with the American Bar Association,* drafted them for this Court, to extend discovery so as to embrace the opposing lawyer's memoranda and hearsay information constituting part of his preparation for trial. Such lawyer's memoranda and hearsay information are not mentioned or included in the Rules as to discovery, and the fact is that up to the time that the Rules were adopted no amendment or addition proposing such inclusion was presented, discussed, voted upon, or recommended by either the Advisory Committee or the American Bar Association. Since time immemorial such lawyer's memoranda and hearsay information have been regarded as an essential and private part of counsel's preparation for trial in the exercise of his function as a member of the Bar or officer of the Court independently representing in a quasi-public character as part of the judicial process one of the opposing parties in the litigation. Neither the Advisory Committee nor the American Bar Association at that time contemplated, intended, or recommended any change in that situation. The orderly and efficient functioning of our system of judicial process depends upon the independent functioning of the respective members of the Bar representing the opposing parties. Such independent functioning, and the maintenance of professional confidence, candor and trust between client and lawyer, would obviously be almost impossible if disclosure were required to the opposing lawyer of

* Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1938 (Chicago: Am. Bar Assn., 1938), p. iii: "It has been said so many times that lawyers cannot or will not cooperate that many people have unfortunately accepted the saying as truth. The history of the adoption of the Rules, like that of every major achievement of the American Bar Association, is a demonstration of the falsity of the saying."

the other lawyer's memoranda and hearsay information in preparation for trial. There would also be serious interference of a practical nature with the orderly and independent presentation of the testimony and other evidence of the respective parties before the Court. Moreover, aside from such interference with orderly judicial process, any reasonable necessity or propriety of such disclosure is questionable. Such lawyer's memoranda and hearsay information do not come into existence until long after the events or facts constituting the cause of action have occurred and after the legal rights of the parties have become fixed. They are in no sense a part of the facts, events, or evidence which constitute or show the cause of action and which came into existence long before the lawyer was retained to prosecute or defend the litigation resulting from the occurrence of those facts or events.

The novel decision of the District Court in the present case (R. 62a) that the existing Rules as to discovery are applicable to lawyer's memoranda or hearsay information in preparation for trial after the material events of the case have occurred and the cause of action has accrued, or were intended to be so applicable, is simply an error or anomaly. It is in conflict with the uniform and almost daily interpretation which has been made of those Rules by all other Federal Courts throughout the period of more than eight years during which they have governed the practice in the District Courts. This Court has in many cases held that the uniform interpretation of a statute over a long period of years by the administrative officials of the Government charged with the duty of interpreting and applying it has the greatest persuasive weight and, unless clearly wrong,

will be accepted by this Court as the proper interpretation of the statute.

Wisconsin v. *Illinois*, 278 U. S. 367;
United States v. *Furrar*, 281 U. S. 624;
Merchants Nat. Bank v. *Commr. of Internal Revenue*, 320 U. S. 256;
Dismuke v. *United States*, 297 U. S. 167;
Louisville & N. R. Co. v. *U. S.*, 282 U. S. 740;
Norwegian Nitrogen Products Co. v. *U. S.*, 288 U. S. 294;
Federal Trade Com. v. *Bunte Bros.*, 312 U. S. 349;
Helvering v. *Winnill*, 305 U. S. 79;
Lucas v. *American Code Co.*, 280 U. S. 445;
Brewster v. *Gage*, 280 U. S. 327;
United States v. *Trucking Assn.*, 310 U. S. 534;
Alaska S. S. Co. v. *United States*, 290 U. S. 256;
United States v. *Chicago R. Co.*, 288 U. S. 1;
Federal Land Bank v. *Warner*, 292 U. S. 53;
Southern Pacific Co. v. *United States*, 307 U. S. 393;
United States v. *Jackson*, 280 U. S. 183;
United States v. *Citizens Loan & T. Co.*, 316 U. S. 209.

Such interpretation of a statute by administrative officials is always of persuasive weight as to its proper legal interpretation even if the interpretation has been made in only one or a few instances.

Billings v. *Truesdell*, 321 U. S. 542, 548;
Adams v. *United States*, 319 U. S. 312;
Great Northern L. Ins. Co. v. *Read*, 322 U. S. 47;

Ford Motor Co. v. *Department of the Treasury*, 323 U. S. 495;
Skidmore v. *Swift & Co.*, 323 U. S. 134;
Helvering v. *Griffith*, 318 U. S. 371;
Sanford v. *Commr. of Internal Revenue*, 308 U. S. 39;
Gray v. *Powell*, 314 U. S. 402.

The Rules, having been adopted pursuant to statutory authority, have of course the legal effect of statute.

Billings v. *Truesdell*, 321 U. S. 542, 551;
Standard Oil Co. v. *Johnson*, 316 U. S. 481, 484.

The Advisory Committee, by divided vote, has recently, on August 26, 1946, proposed an amendment to the Rules which would, in certain instances, extend discovery so as to embrace the type of lawyer's memoranda and hearsay information which the District Court erroneously held in the present case is discoverable under the existing Rules. That amendment, however, has been so recently proposed that the American Bar Association, this Court, and the other persons and officials directly interested have not yet had a reasonable opportunity to discuss and consider it and to express an opinion with respect to whether or not the existing Rules should be changed so as to add such an amendment. The current issue of the American Bar Association Journal (October, 1946, vol. 32, pp. 629-630) states in part as follows:

"The Advisory Committee's submission of its proposed Amendments was made on August 26. The release of the draft condemnation rule for study was authorized by the Committee on Sep-

tember 6. The time before this issue of the Journal goes to press (September 9) has been insufficient to permit our preparation of an adequate analysis and comment.

Walter P. Armstrong, of the Board of Editors, who has been following the amendments closely, prepared for the West Publishing Company an informative analysis and well-annotated commentary, which has been published in the Federal Reporter (156 Fed. 2nd, No. 2, pages xix-xxxix) and the Federal Supplement (Vol. 66; No. 3; Advance Sheets, pages XIX-XXXIX), and in 5 F. R. D. 339. As nearly all of our readers have access to these Advance Sheets, we refer to his article those who wish to read an analysis of the amendments. The condemnation rule, of course, is not included.

In his commentary on the proposed amendments as to 'discovery,' Mr. Armstrong said, in part:

"The most perplexing problem that confronted the Committee in dealing with discovery was the extent to which a party should be permitted to delve into an adversary's investigation file which contains statements of witnesses, photographs, maps, etc., procured in preparation for trial. The First and Second Drafts merely provided that the court could impose designated restrictions "upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial." This left the matter entirely at the discretion of the court. It was suggested that it did not solve the problem nor make for uniformity because the probable result would be that each district judge would adopt in his own district an inflexible rule. (Armstrong, Second Draft of Proposed Amendments,

page 498.) Indeed, the Committee itself deprecated the fact that the proposed amendment did not establish any standard for the exercise of judicial discretion. In a tone of despair it appealed to the Bar: "If members of the profession can formulate a general statement of the standard for exercising discretion, the Committee will welcome it and give it careful consideration." (Second Draft, pages 39, 40.)

After the release of the Second Draft the Circuit Court of Appeals for the Third Circuit dealt with the subject in *Hickman* v. *Taylor* (153 F. 2d 212). * * *

There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar. The Amendment was first fully released when the Report was filed with the Court; therefore there has been* and will be no opportunity for general discussion. This in itself is unfortunate. * * *

The draftsmanship of this Amendment leaves something to be desired. Probably one of its primary purposes was, in exceptional cases, to broaden the right of discovery beyond the limitation imposed by *Hickman* v. *Taylor*. Yet its approach is negative. It is placed under Rule 30(b) titled "Orders for Protection of Parties and Deponents". The clear implication is that in the cases of hardship provided for, statements of witnesses and other similar objective preparations for trial are discoverable even when they are the "work product" of a lawyer. This construction

* An exception is the vigorous discussion of both *Hickman* v. *Taylor* and the Amendment, at the last Judicial Conference of the Third Circuit. Among the participants were counsel and *amici curiae* in *Hickman* v. *Taylor*. See transcript, Ninth Annual Judicial Conference of the Third Judicial Circuit of the United States, pages 21 *et seq.*

> is further strengthened when the Amendment is considered in connection with the broad scope of pre-trial inquiry specifically permitted under Rule 26, and made expressly applicable to all methods of discovery. It will probably be sometimes argued, however, that the Amendment is a further immunity to discovery and is in addition to the privilege accorded a lawyer under *Hickman* v. *Taylor.*' "

The drafting, recommending, and adopting of an amendment to, or extension of, the Rules of so novel, serious, and sweeping a nature as to embrace discovery to opposing counsel of a lawyer's memoranda and hearsay information in preparation for trial, is not a matter which should be done hurriedly and without proper consideration. It should not be done merely incidentally in connection with the decision of a particular law suit which is pending between two private parties and which must be quickly determined. The customary and proper method is for the Court to give the Bar as a whole, all of whom are directly interested, a reasonable opportunity to consider any important proposed change in the Rules. Such reasonable opportunity has not yet been given to the Bar with respect to the amendment proposed on August 26, 1946, by divided vote of the Advisory Committee. The present status is that (Am. Bar Assn. Journal, Oct. 1946, vol. 32, p. 630):

> "There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar."

The fact that such a recently-proposed Amendment has already encountered strong and widespread opposition among the Bar, and that the exact nature,

extent, and particular grounds of the opposition have not yet been considered or determined, make it evident that the proposed Amendment is serious in character and that its form and substance, and the question of its desirability or necessity, or of alternatives, should be examined further. The various and vigorously-expressed objections to it should be considered with deliberation so that the final draft will represent the best and most impartial thought in the public interest of both Bench and Bar. Precipitate or ill-considered action in such an important matter in which an overwhelming majority of both Bench and Bar may strongly condemn the precipitate action taken would, we respectfully submit, be unreasonable and imprudent.

Accordingly the American Bar Association respectfully suggests to the Court that the present case of *Hickman* v. *Taylor* should be determined according to the Rules as they now exist, which means that the decision of the United States Circuit Court of Appeals should be affirmed.

The American Bar Association further suggests and requests that this Court give the American Bar a reasonable opportunity to consider and make a recommendation to the Court and to the Advisory Committee with respect to the amendment proposed and released for publication by that Committee on August 26, 1946.

II.

The District Court in the present case evidently realized that there was at least great doubt whether the existing Rules warranted its novel decision, because in its opinion (R. 62a) it makes an effort to

support its decision independently of those Rules. It resorts in substance to an earlier rule of law making admissible in evidence, and therefore discoverable, the records and reports contemporaneously made in ordinary course of business by a party or his regular employee having knowledge of the facts or events recorded or reported. Then it proceeds to say or assume that the lawyer, notwithstanding he had been retained merely to "defend whatever litigation arose" (R. 63a) was "acting primarily as an investigator" (R. 66a) or employee of the client for the purpose of reporting facts to his client, and that "the lawyer is merely the medium through which his client becomes apprised of facts" (R. 66a). It wholly ignores the lawyer's function and duty in the judicial process, as a member of the Bar and officer of the Court who has been retained merely to defend litigation (R. 63a), to ascertain the facts and the detailed proposed testimony and evidence from the client and the client's employees, and to report or present those facts and evidence to the Court. On the basis of these premises or arbitrary assumptions, the District Court reaches the novel and astonishing conclusion that the rule of law with respect to admissibility and discoverability of a party's records and reports made contemporaneously in ordinary course of business applies to a lawyer's later memoranda and hearsay information which were clearly part of his preparation for trial during the period from March 4, 1943, to March 29, 1943 (R. 63a). That was four months after November 25, 1943, when all of the material events of the case had occurred, the cause of action had accrued, and the respective legal rights of the parties had become fixed (R. 62a).

III.

In the common law Courts, pleading and practice have always permitted a defendant to file merely a general or specific denial and thus, as it is called, "put the plaintiff to his proof". In the criminal law Courts this has been regarded as to a large extent necessary in order to protect the presumption of the accused's innocence of the crime charged. Such method often results in injustice, however, in both the common law and criminal Courts in the special case in which the defendant has exclusive knowledge and possession of, or access to, the evidence establishing the circumstances of the accident or alleged crime involved. Disclosure of the defendant's "story" in such special cases is made, if ever, at the trial. The defendant, however, may merely move to dismiss at the end of the plaintiff's case, and the real story of the accident may never become known to the plaintiff or the Court. Appreciating this, the common law Courts, without changing their fundamental general method, have in recent times resorted in such special cases to a variety of extraordinary remedies to enable the plaintiff to ascertain the defendant's story, obtain access to the existing physical evidence, and make reasonable preparation for trial. The American Bar Association, as representative of practically the entire active Bar, cooperated to the greatest extent possible in the very extensive and widespread effort which was made by Bench and Bar to achieve greater practical justice under modern conditions of great enterprises and organizations and of a largely-industrialized economy by bringing order and efficiency into this system of practice in the Federal common law and equity courts. This resulted in adoption of

the Federal Rules of Civil Procedure on September 16, 1938. The Rules as a whole have proven to be fair and effective in daily Court practice over a long period of more than eight years, and their interpretation by the Federal Courts throughout the country in the particular respects challenged in the present case has been uniform and to the contrary of the District Court's decision in this case. The suggestion of petitioner's attorney and of the District Court is in substance that the present Rules should be amended or given a forced interpretation in order to afford the novel, startling, and desperate remedy of permitting counsel for one party to have access to the lawyer's memoranda and hearsay information of counsel for the opposing party. To any Court or experienced trial counsel, the disorder, confusion, and practical injustice in the functioning of the judicial process which would result from adoption of such an ill-considered suggestion are obvious, and the necessity for its adoption as against other alternatives, either in existing Rules or in a future carefully-considered Amendment, is clearly not established.

It appears that the present case is peculiar in that it is really an admiralty case which, at the choice of plaintiff's counsel, has gotten into a common law court. The admiralty Courts have never found it necessary, in the interest of justice, to resort to the desperate remedy suggested by plaintiff's counsel in this case. The question of how the admiralty Courts have succeeded in devising a practice which achieves justice in such cases without resort to the desperate remedy now suggested by plaintiff's counsel is therefore important and significant. It bears directly on the question whether or not it is necessary to resort to such a desperate remedy which is itself fraught with harmful

results of a different and obviously more serious and extensive nature to the entire system of effective and orderly functioning of the judicial process.

In the admiralty, the case which the common law courts regard as a special case requiring extraordinary remedy or presumption, namely, a case in which one party has almost exclusive knowledge and possession of, or access to, the facts, physical evidence and circumstances of the accident, is the general or usual case. Cargo is delivered by a vessel in damaged condition; the shipowner through his employees, the master and crew of the vessel, has exclusive knowledge of the circumstances or accident giving rise to the damage, and has possession of the physical evidence. Or two vessels are in collision; neither knows what was being done on board the other vessel, or what the physical evidence or circumstances may be on the other vessel, excepting as observed from a distance during the brief period preceding collision. Accordingly the whole practice of the admiralty is designed to afford a fair disclosure of the facts and physical evidence to the other party or vessel involved so that reasonable preparation for trial is possible. A general or specific denial by a respondent of the allegations in the libel is not sufficient. The respondent must allege his version of the facts of the accident, and of the circumstances leading up to it, and must reply to each article in the libel. Admiralty Rule 22 (promulgated by this Court on Dec. 6, 1920, to take effect March 7, 1921) provides in part as follows:

> "The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be,

> enabled to answer distinctly and separately the several matters contained in each article; * * *."

Admiralty Rule 26 provides in part as follows:

> "* * * and all answers shall be full and explicit and distinct as to each separate article and separate allegation in the libel, in the same order as numbered in the libel, * * *."

A custom of mariners since time immemorial, supplemented by a statute, requires each vessel to keep a daily and hourly log book or record book in which the physical operations and conditions on the vessel, and the movements, courses, weather and sea conditions, and orders, are chronologically and continuously recorded, as well as any changes made or occurring therein, and the times of such change, and the circumstances of any accident occurring, and the names of the persons on watch at the times of occurrence of the various events and of the issuance of orders.

Promptly after damage to vessel or cargo is discovered, notice must be given to all interested parties and opportunity afforded to attend, through skilled surveyor representatives, a survey or examination at a specified time and place, or else a strong presumption or adverse inference is drawn against the party failing to give such notice.

Another statute requires the master of the vessel to make a detailed written report of every accident to the vessel to Steamboat Inspectors, who thereupon hold an investigation or hearing at which the principal officers and crew involved are called as witnesses, and a transcript is afforded to all interested parties.

The charts and all log books, records, reports and material physical evidence involved must in so far as possible be preserved by the shipowner, and be made

available for examination on certain reasonable conditions or when required by Court order.

The witnesses or members of the crew involved in the particular occurrence are designated as necessary witnesses who must be called by the shipowner to prevent a strong adverse inference.

The British Admiralty Courts also in collision cases require the filing in a sealed envelope by both libellant and respondent of a Preliminary Act within a few days after suit is begun. This Preliminary Act states the particulars or detailed circumstances of the collision, and is opened immediately the pleadings are completed, or earlier on consent of both parties. Roscoe's Admiralty Practice, 4th edition (London: Stevens & Sons, 1920), pp. 327-329. In neither the British nor the American Admiralty Courts is discovery or inspection permitted of the opposing lawyer's memoranda or hearsay information. Roscoe's Admiralty Practice, 4th ed., pp. 344-347.

Some adaptation by the common law Courts of the Admiralty Practice above-described in the special cases, like the present, in which in substance an admiralty case is being brought on the common law side of the Court, would seem to be more desirable by Amendment to the present Rules or by a statute, rather than to throw the whole judicial process into confusion and disorder by extending discovery to the opposing lawyer's memoranda and hearsay information by a precipitate and forced interpretation of the present Rules. At least a reasonable opportunity should be given to the Bar to consider and determine the proper form and substance of any proposed Amendment to the Rules.

CONCLUSION

The decree in this case of the United States Circuit Court of Appeals for the Third Circuit should be affirmed.

Dated: October 21, 1946.

Respectfully submitted,

B. Allston Moore,
James W. Ryan,
J. Harry LaBrum,
Francis H. Inge,
Benjamin W. Yancey,
Counsel for American Bar Association as amicus curiae.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

Petitioner,

vs.

JOHN M. TAYLOR and GEORGE ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, *et al.*,

Respondents.

SUPPLEMENT TO BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

B. ALLSTON MOORE,
JAMES W. RYAN,
J. HARRY LABRUM,
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Respondents.

SUPPLEMENT TO BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

In view of the fact that our present Federal Rules of Civil Procedure, 1938, with respect to Discovery, are substantially identical with the modern British Rules, this Court will no doubt be interested to know the settled interpretation of these Rules which has been arrived at by the British Courts after many years of experience. We therefore take the liberty of citing the following authorities, in which the Court will find a detailed analysis and discussion of the decisions of the British Courts on this subject:

Pleading and Practice in Civil Actions in the High Court of Justice, by W. Blake Odgers,

K.C., Director of Legal Studies at the Inns of Court, 8th edition (London: Stevens and Sons, Ltd., 1918), at page 10.

Chapted XV, entitled "Discovery of Documents", in Odgers on Pleading and Practice, 8th edition, at pages 284, 285 and 289.

Chapter XVI, entitled "Interrogatories", in Odgers on Pleading and Practice, 8th edition, at pages 290, 296-297, 302-303, and 305.

The "Appendix of Precedents" in Odgers on Pleading and Practice, 8th edition, at pages 470 and 471, giving the customary form based on "Precedents", or settled interpretation by the Courts, of the "Affidavit as to Documents" filed in response to an order for Discovery.

"The Annual Practice 1945", sixty-third annual issue (London: Sweet and Maxwell, Stevens and Sons, and Butterworth & Co., 1945), "being a collection of the Statutes, Orders and Rules relating to the General Practice, Procedure, and Jurisdiction of the Supreme Court, with Notes, etc., by W. Valentine Ball, O.B.E., Senior Master of the Supreme Court, * * * R. F. Burnand, O.B.E., a Master of the Supreme Court, and F. C. Watmough", at pages 522-533 and 528-534, and containing the text of the British Rules as to Discovery in the numbered headings at pages 519, 538-539, 541, 548, 550-551, 554-557, 561, and 563-568.

During a long period after the British Rules with respect to Discovery in accordance with the modern

reform known as the Judicature Acts had been issued, Discovery remained non-existent in the United States. Andrew's Stephen's on Pleading, 2nd edition, page 13.

Dated, October 23, 1946.

Respectfully submitted,

B. Allston Moore,
James W. Ryan,
J. Harry LaBrum,
Francis H. Inge,
Benjamin W. Yancey,
Counsel for American Bar Association as amicus curiæ.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1946.

George E. Hickman, as Administrator of the Estate of Norman E. Hickman, Deceased, Petitioner, v. John M. Taylor and George Anderson, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 13, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

On February 7, 1943, the tug "J. M. Taylor" sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent

Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor'. Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and

repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting *en banc*, held that the requested matters were not privileged. 4 F. R. D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners, forthwith "answer Plaintiff's 38th interrogatory and supplemental interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Upon

their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting *en banc*, reversed the judgment of the District Court. 153 F. 2d 212. It held that the information here sought was part of the "work product of the lawyer" and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts,[1] led us to grant certiorari. 328 U. S. —.

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings.[2] Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method.[3] The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to

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[1] See cases collected by Advisory Committee on Rules for Civil Procedure in its Report of Proposed Amendments (June, 1946), pp. 40–47; 5 F. R. D. 433, 457–460. See also 2 Moore's Federal Practice (1945 Cum. Supp.), § 26.12, pp. 155–159; Holtzoff, "Instruments of Discovery under Federal Rules of Civil Procedure," 41 Mich. L. Rev. 205, 210–212; Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 301–307.

[2] "The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials." Sunderland, "The Theory and Practice of Pre-Trial Procedure," 36 Mich. L. Rev. 215, 216. See also Ragland, Discovery Before Trial (1932), ch. I.

[3] 2 Moore's Federal Practice (1938), § 26.02, pp. 2445–2455.

narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[4]

There is an initial question as to which of the deposition-discovery rules is involved in this case. Petitioner, in filing his interrogatories, thought that he was proceeding under Rule 33. That rule provides that a party may serve upon any adverse party written interrogatories to be answered by the party served.[5] The District Court proceeded on the same assumption in its opinion, although its order to produce and its contempt order stated that both Rules 33 and 34 were involved. Rule 34 establishes a procedure whereby, upon motion of any party showing good

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[4] Pike and Willis, "The New Federal Deposition-Discovery Procedure," 38 Col. L. Rev. 1179, 1436; Pike, "The New Federal Deposition-Discovery Procedure and the Rules of Evidence," 34 Ill. L. Rev. 1.

[5] Rule 33 reads: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."

cause therefor and upon notice to all other parties, the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, etc., not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control.[6]

The Circuit Court of Appeals, however, felt that Rule 26 was the crucial one. Petitioner, it said, was proceeding by interrogatories and, in connection with those interrogatories, wanted copies of memoranda and statements secured from witnesses. While the court believed that Rule 33 was involved, at least as to the defending tug owners, it stated that this rule could not be used as the basis for condemning Fortenbaugh's failure to disclose or produce the memoranda and statements, since the rule applies only to interrogatories addressed to adverse parties, not to their agents or counsel. And Rule 34 was said to be inapplicable since petitioner was not trying to see an original document and to copy or photograph it, within the scope of that rule. The court then concluded that Rule 26 must be the one really involved. That provides that the testimony of any person, whether a party or not, may be taken by any party by deposition upon oral examination or writ-

[6] Rule 34 provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

ten interrogatories for the purpose of discovery or for use as evidence; and that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things.'

The matter is not without difficulty in light of the events that transpired below. We believe, however, that petitioner was proceeding primarily under Rule 33. He addressed simple interrogatories solely to the individual tug owners, the adverse parties, as contemplated by that rule. He did not, and could not under Rule 33, address such interrogatories to their counsel, Fortenbaugh. Nor did he direct these interrogatories either to the tug owners or to Fortenbaugh by way of deposition; Rule 26 thus could not come into operation. And it does not appear from the rec-

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[1] The relevant portions of Rule 26 provide as follows:

"(a) *When Depositions May be Taken.* By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

"(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

ord that petitioner filed a motion under Rule 34 for a court order directing the production of the documents in question. Indeed, such an order could not have been entered as to Fortenbaugh since Rule 34, like Rule 33, is limited to parties to the proceeding, thereby excluding their counsel or agents.

Thus to the extent that petitioner was seeking the production of the memoranda and statements gathered by Fortenbaugh in the course of his activities as counsel, petitioner misconceived his remedy. Rule 33 did not permit him to obtain such memoranda and statements as adjuncts to the interrogatories addressed to the individual tug owners. A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney. But that is not this case. Here production was sought of documents prepared by a party's attorney after the claim has arisen. Rule 33 does not make provision for such production, even when sought in connection with permissible interrogatories. Moreover, since petitioner was also foreclosed from securing them through an order under Rule 34, his only recourse was to take Fortenbaugh's deposition under Rule 26 and to attempt to force Fortenbaugh to produce the materials by use of a subpoena *duces tecum* in accordance with Rule 45. Holtzoff, "Instruments of Discovery under the Federal Rules of Civil Procedure," 41 Mich. L. Rev. 205, 220. But despite petitioner's faulty choice of action, the District Court entered an order, apparently under Rule 34, commanding the tug owners and Fortenbaugh, as their agent and counsel, to produce the materials in question. Their refusal led to the anomalous result of holding the tug owners in contempt for failure to produce that which was in the possession of their counsel and of holding Fortenbaugh in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or Rule 34.

But under the circumstances we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below. It matters little at this late stage whether Fortenbaugh fails to answer interrogatories filed under Rule 26 or under Rule 33 or whether he refuses to produce the memoranda and statements pursuant to a subpoena under Rule 45 or a court order under Rule 34. The deposition-discovery rules create integrated procedural devices. And the basic question at stake is whether any of those devices may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt. Nor does it relieve us of the responsibility of dealing with the problem raised by that attempt. It would be inconsistent with the liberal atmosphere surrounding these rules to insist that petitioner now go through the empty formality of pursuing the right procedural device only to reestablish precisely the same basic problem now confronting us. We do not mean to say, however, that there may not be situations in which the failure to proceed in accordance with a specific rule would be important or decisive. But in the present circumstances, for the purposes of this decision, the procedural irregularity is not material. Having noted the proper procedure, we may accordingly turn our attention to the substance of the underlying problem.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized

by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way

proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary

[8] "One of the chief arguments against the 'fishing expedition' objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position." Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L. Rev. 297, 303.

here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without

any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules.[9] Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discov-

[9] The English courts have developed the concept of privilege to include all documents prepared by or for counsel with a view to litigation. "All documents which are called into existence for the purpose—but not necessarily the sole purpose—of assisting the deponent or his legal advisers in any actual or anticipated litigation are

ery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence,

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privileged from production. . . . Thus all proofs, briefs, draft pleadings, etc., are privileged; but not counsel's indorsement on the outside of his brief . . ., nor any deposition or notes of evidence given publicly in open Court. . . . So are all papers prepared by any agent of the party *bona fide* for the use of his solicitor for the purposes of the action, whether in fact so used or not. . . . Reports by a company's servant, if made in the ordinary course of routine, are not privileged, even though it is desirable that the solicitor should have them and they are subsequently sent to him; but if the solicitor has requested that such documents shall always be prepared for his use and this was one of the reasons why they were prepared, they need not be disclosed." Odgers on Pleading and Practice (12th ed., 1939), p. 264.

See Order 31, rule 1, of the Rules of the Supreme Court, 1883, set forth in The Annual Practice, 1945, p. 519, and the discussion following that rule. For a compilation of the English cases on the matter see 8 Wigmore on Evidence (3d ed., 1940), § 2319, pp. 618–622, notes.

briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden,

we believe, is necessarily implicit in the rules as now constituted.[10]

Rule 30 (b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordi-

[10] Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents. See Report of Proposed Amendments by Advisory Committee on Rules for Civil Procedure (June, 1946); 5 F. R. D. 433.

nary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case.[11] It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unquali-

[11] See Report of Proposed Amendments by Advisory Committee on Rules for Civil Procedure (June, 1946), pp. 44–47; 5 F. R. D. 433, 459–460; Discovery Procedure Symposium before the 1946 Conference of the Third United States Circuit Court of Appeals, 5 F. R. D. 403; Armstrong, "Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments," 5 F. R. D. 339, 353–357.

fied right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1946.

George E. Hickman, as Administrator of the Estate of Norman E. Hickman, Deceased, Petitioner, *v.* John M. Taylor and George Anderson, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 13, 1947.]

Mr. Justice Jackson, concurring.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded "Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." The question is simply whether such a demand is authorized by the rules relating to various aspects of "discovery".

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and

tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

"Discovery" is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, Discovery Before Trial (1932) 13–16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, *amicus* briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. See Report of the Commission on the Administration of Justice in New York State (1934) 330–31; Ragland, Discovery Before Trial (1932) 35–36. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. *Cf.* Report of Commission on the Administration of Justice in New York State (1934) 41–42. It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither

evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to "set forth in detail the exact provision of any such oral statements or reports." Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be depar-

tures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot inter-

view them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery as fully as on the trial to disclose his version of the facts. But that is his own disclosure—it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. So the literal language of the Act of Congress which makes "any writing or record . . . made as a memorandum of any . . . occurrence or event" admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. *Cf. Palmer* v. *Hoffman*, 318 U. S. 109, 111. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, "Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication." 318 U. S. at 114. We pointed out that there, as here, the "several hundred years of history behind the Act . . . indicate the nature of the reforms which it was designed to effect." 318 U. S. at 115. We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. *Palmer* v. *Hoffman*, 318 U. S. 109.

Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on "showing good cause therefor" the court may order their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

MR. JUSTICE FRANKFURTER joins in this opinion.